Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD ALAMEIDA, et al., *Petitioners,*

v.

EARL WYATT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Prison Litigation Reform Act's administrative remedies exhaustion requirement is a condition precedent to a prisoner's conditions of confinement lawsuit or an affirmative defense that must be pleaded and proven by the defense.

2. Whether the Ninth Circuit's heightened notice requirement for defense motions based on a prisoner's failure to satisfy the Prison Litigation Reform Act's administrative remedies exhaustion mandate and in summary judgment generally is an impermissible amendment of the Federal Rules by judicial interpretation.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners in this official capacity action are Director Edward Alameida of the California Department of Corrections and Warden Michael Knowles of Mule Creek State Prison. Petitioners are the official capacity successors in office to the defendants before the district court and appellees in the Ninth Circuit Court of Appeals.

Respondent

The respondent is Earl Wyatt (California Department of Corrections No. C-90121). Respondent was the plaintiff in the district court and appellant in the Ninth Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Director Edward Alameida of the California Department of Corrections and Warden Michael Knowles of Mule Creek State Prison respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's second amended opinion (App. A) is reported at *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003) (*Wyatt III*). Superceded published opinion in this action are reported at *Wyatt v. Terhune*, 280 F.3d 1238 (9th Cir. 2002) (*Wyatt I*) and *Wyatt v. Terhune*, 305 F.3d 1033 (9th Cir. 2002) (*Wyatt II*). The Ninth Circuit's published denials of petitioners' petitions for rehearing are published at *Wyatt v. Terhune*, 305 F.3d 1033 (9th Cir. 2002) (App. D) and *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2002) (App. E). The unpublished District Court opinion granting petitioners' motion to dismiss is *Wyatt v. Terhune*, CIV S 99-0503 LKK JFM P (E.D. Cal. 1999). (App. B). The unpublished District Court opinion granting petitioners' motion for summary judgment is *Wyatt v. Terhune*, CIV S 99-0503 LKK JFM P (E.D. Cal. 1999). (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, as reported in the second amended opinion, was entered on January 2, 2003. (App. A). The court denied petitioners' petition for rehearing en banc from the first

amended opinion on December 31, 2002. (App. D). Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Prison Litigation Reform Act of 1996 states in relevant portion:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

B. The Rules Enabling Act provides in pertinent part:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

28 U.S.C. § 2071(a).

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases

> in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

28 U.S.C. § 2072(a).

C. The Federal Courts Study Act provides in pertinent part:

> The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.

28 U.S.C. § 331.

STATEMENT OF THE CASE

Respondent's civil complaint alleges that the California Department of Corrections' grooming regulations violate his constitutional and statutory rights to the free exercise of religion and equal protection of the laws. Petitioners moved to dismiss based upon respondent's failure to exhaust available administrative remedies prior to bringing suit as required under the Prison Litigation Reform Act of 1996 (PLRA). The district court dismissed respondent's equal protection claim, but

preserved the free exercise claim on the basis that exhaustion of that claim would be futile.[1]

Petitioners subsequently followed the district court's direction to move for summary judgment on the remaining free exercise claim. The magistrate judge's order referenced the factual findings of an analogous prior action and referred respondent to a prior order stating certain "heightened notice" requirements for opposing Rule 56 summary judgment motions as required by the Ninth Circuit. *See Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998). Petitioners then filed a properly noticed summary judgment motion, reiterated the *Rand* heightened notice, and relied extensively upon the Magistrate Judge's prior analysis. The district court then granted summary judgment.

Respondent appealed both the court's dismissal of his equal protection claim and the summary judgment terminating his free exercise claim. Respondent challenged the dismissal by arguing that a futility exception existed for the PLRA exhaustion mandate. The Ninth Circuit did not address this issue, and instead held, *sua sponte* and without briefing by the parties, that petitioners' motion to dismiss should have been denied because it relied on evidence extrinsic to the complaint, and that the district court failed to convert the motion to one for summary judgment. The court further *sua sponte* reversed the district court by holding that PLRA exhaustion constituted an affirmative defense for which petitioners bore the burden of proof, and that petitioners had failed to meet that burden.

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1. Petitioners note that the district court ruled without the benefit of this Court's subsequent PLRA decision in *Booth v. Churner*, 532 U.S. 731 (2001), which instructed that courts should "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n. 6.

Respondent's appeal from summary judgment argued that the magistrate judge took judicial notice of a prior action's factual determinations in violation of Rule 201 of the Federal Rules of Evidence. The Ninth Circuit explicitly declined to rule on this issue and instead reversed, again *sua sponte* and without party briefing, on the basis that respondent failed to receive fair notice of the requirements for opposing summary judgment under the *Rand* heightened notice doctrine.

Petitioners then petitioned for rehearing with a suggestion for rehearing en banc on the basis that PLRA exhaustion was a condition precedent to suit for which respondent bore the pleading burden, and that a motion to dismiss provided a proper procedural mechanism for this threshold challenge. The *Wyatt* Panel then ordered supplemental briefing. Without granting rehearing, the *Wyatt* Panel ruled that PLRA exhaustion must be challenged under the "unenumerated" section of Rule 12(b) of the Federal Rules of Civil Procedure, that it remained an affirmative defense for which petitioners bore the burden of proof, and that the proof tendered was insufficient to affirm the district court below. The *Wyatt* Panel also *sua sponte* extended *Rand* heightened notice requirements from Rule 56 summary judgment motions to Rule 12 motions to dismiss. The Ninth Circuit also rejected the suggestion for a rehearing en banc.

Petitioners then petitioned for an en banc rehearing from the first amended opinion. This petition challenged the *Wyatt* Panel's ruling that Federal Rules notice and the two heightened notices stating the requirements for opposing summary judgment failed to provide respondent with sufficient notice. The petition further challenged the *Wyatt* Panel's decision to extend *Rand* heightened notice requirements to motions to dismiss. Without further briefing or rehearing, the *Wyatt* Panel filed a second amended opinion limiting the *Rand* extension to motions to dismiss challenging administrative exhaustion, and maintaining its prior *Rand* extension in the summary judgment

context. The Ninth Circuit also rejected petitioner's petition for rehearing en banc. Petitioners then petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT SPLIT IN CIRCUIT APPROACHES TO ENFORCING THE PRISON LITIGATION REFORM ACT'S EXHAUSTION MANDATE

This Court has recognized the importance of PLRA exhaustion arguments in the federal courts by recently publishing two unanimous opinions reversing appellate court attempts to limit the exhaustion mandate. *Porter v. Nussle*, 534 U.S. 516 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). Federal caseload profiles report that prisoner actions comprise approximately one-fifth of all federal cases, numbering more than the federal courts' entire criminal docket.[2] However, this Court has not yet addressed the pleading requirements for Congress' PLRA-enacted defenses, nor that statute's heightened pleading requirement through the rule announced in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). Accordingly, this important and timely issue remains unresolved.

Two circuits have attempted to reconcile the PLRA exhaustion mandate with the *Swierkiewicz* opinion's model for

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2. The federal judiciary's most recent and historical caseload profiles can be electronically accessed at http://www.uscourts.gov.

enacting pleading requirements, and reached diametrically opposed results. In *Baxter v. Rose*, 305 F.3d 486 (6th Cir. 2002), the Sixth Circuit held that the PLRA created a formal and statutory requirement that prisoner-plaintiffs plead and establish exhaustion as a condition precedent to suit. *Id.* 489-90. *Baxter* based this holding on its own precedent and the integrated nature of the PLRA statutory mechanism. Under the PLRA, the courts, rather than defendants, bear the primary burden of screening complaints where no relief may be granted. *Id.* at 490l; *see* 28 U.S.C. § 1915A(b)(1); 42 U.S.C. § 1997e(c)(1); 28 U.S.C. § 1915(e)(2)(B) (sections mandating initial case screening and supplemental *sua sponte* dismissal authority).

In *Wyatt III*, the Ninth Circuit reached a contrary result. The *Wyatt III* Panel found that Congress did not use sufficiently explicit language to create a pleading requirement under *Swierkiewicz*. (App. A at 11-13) *Wyatt III* explicitly disagreed with the Sixth Circuit's approach to PLRA exhaustion. (App. A at 13 n. 12.) Accordingly, *Wyatt III* creates an inter-circuit conflict applying this Court's *Swierkiewicz* decision to PLRA exhaustion.

The remaining circuit authority is badly fractured with regard to the procedures governing PLRA exhaustion challenges, and silent on the application of *Swierkiewicz*. Courts holding that PLRA exhaustion is an affirmative defense, including those referenced by *Wyatt III*, derive their view from dicta in *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999), noted as the court was dismissing on other grounds. *See* App. A at 11a; *Massey v. Helman*, 196 F.3d 727, 734–35 (7th Cir. 1999) (relying on *Jenkins*); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) (relying on *Massey*). The Second Circuit statement, in its entirety, reads as follows: "Because, under the PLRA, a prisoner must exhaust administrative remedies before filing a § 1983 suit and, in the case of suits seeking damages for

mental or emotional injuries, make a prior showing of physical injury, a defendant in a prisoner § 1983 suit may also assert as an affirmative defense the plaintiff's failure to comply with the PLRA's requirements." *Jenkins*, 179 F.3d 19, 28-29.[3]

The circuits addressing this issue are also internally divided. The Seventh Circuit's *Massey v. Helman* decision is contradicted by *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000), which stated that "dismissal on the pleadings is proper for failure to plead the exhaustion of all administrative remedies." Other Seventh Circuit cases also state that exhaustion is a "precondition" to suit. *See Smith v. Zachary*, 255 F.3d 446, 451-52 (7th Cir. 2001); *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 534-36 (7th Cir. 1999). The Eighth Circuit is similarly self-contradicting as it has held that prisoner-plaintiffs must allege exhaustion in their complaints and attach proof if it is available. *McAlphin v. Morgan*, 216 F.3d 680, 682 (8th Cir. 2000).

Similarly, the Third Circuit's *Ray v. Kertes,* 285 F.3d 287, 295 (3d Cir. 2002), adopted *Wyatt*, but is inconsistent with the facts underlying its prior decision in *Booth v. Churner*, 206 F.3d 289, 292-93 (3rd Cir. 2000) (*sua sponte* dismissal based on prisoner's failure to plead exhaustion), *aff'd*, 532 U.S. 731 (2001). This division within the Third Circuit mirrors that of the Ninth. Prior to *Wyatt III*, the Ninth Circuit had itself recognized without comment a district court's *sua sponte* dismissal of a prisoner's action based on his failing to plead exhaustion. *Bennett v. King*, 205 F.3d 1188, 1189 (9th Cir. 2000).

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3. *Wyatt III* also relies on *Jackson v. District of Columbia*, 254 F.3d 262 (D.C. Cir. 2001), to argue PLRA exhaustion is an affirmative defense. *Jackson* did not decide this issue, however, and instead simply ruled that the defendants' attempt to assert exhaustion as an affirmative defense was untimely. *Id.* at 267.

The Fifth Circuit follows a condition-precedent approach similar to that of the Sixth Circuit requiring that the prisoner plead exhaustion with "sufficient specificity" to prevent *sua sponte* dismissal. *Underwood v. Wilson*, 151 F.3d 292, 294 (5th Cir. 1998). Additionally, in resolving *Porter v. Nussle*, 534 U.S. 516 (2002), this Court favorably referenced four circuit court opinions each of which follows a "condition precedent" or "precondition" approach. *Smith v. Zachary*, 255 F.3d 446, 451-52 (7th Cir. 2001) ("precondition"); *Higginbottom v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 2000) (same); *Booth v. Churner*, 206 F.3d 289, 292-93 (3rd Cir. 2000) (*sua sponte* dismissal based on prisoner's failure to plead exhaustion), *aff'd*, 532 U.S. 731 (2001); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE *WYATT III* HEIGHTENED NOTICE REQUIREMENTS CONFLICT WITH THE RULES EMPLOYED BY ALL OTHER CIRCUITS AND THE FEDERAL RULES OF CIVIL PROCEDURE

This Court has recognized that "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *McNeil v. United States*, 508 U.S. 106, 112-13 (1993). Congress has also delegated rules-making authority through legislation such as the Rules Enabling Act and Federal Courts Study Act. 28 U.S.C. §§ 331, 2071(a), 2072(a). This Court is accordingly authorized to prescribe such rules "for the other courts of the United States pursuant to law." 28 U.S.C. § 331. Lower federal courts also possess authority, so long as

they comport with 28 U.S.C. § 2072, to give public notice and then promulgate rules governing their own operations. Fed. R. App. P. 47(a)(1); Fed. R. Civ. P. 83(a)(1). This Court's *Swierkiewicz* opinion reiterated that rules modification "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz,* 534 U.S. at 515.

In *Wyatt II*, the Ninth Circuit declined to follow this approach, and instead extended a judicially-crafted, heightened notice doctrine that requires district courts or defendants to affirmatively advise a prisoner-plaintiff how to defeat the defendants' summary judgment motion. Prior to *Wyatt II*, the Ninth Circuit limited this doctrine to the summary judgment context, reasoning that the complexity and terminal result of summary judgment rendered Federal Rules notice requirements inadequate. The Ninth Circuit then published *Wyatt III*, extending the heightened notice doctrine both to Rule 12 motions to dismiss and to other situations where summary judgment might be unusually complex in the reviewing court's opinion. (App. A at 5 n. 6.) The *Wyatt III* Panel *sua sponte* reversed the district court on this ground and expressly declined to rule on the issue respondent raised on appeal. (App. A at 11.) The *Wyatt III* Panel then found the district court's initial heightened notice and subsequent reminder of that notice inadequate, as well as petitioner's own heightened notice warning. The Ninth Circuit further rejected petitioners request for an en banc rehearing to address this *sua sponte* ruling.

Diametrically opposed to the Ninth Circuit's *Wyatt* approach, the Sixth Circuit requires only the notice specified by the Federal Rules for motions practice. *Williams v. Browman*, 981 F.2d 901, 903-04 (6th Cir. 1992). The First, Third, Eighth, and Tenth Circuits have filed no opinions creating a heightened notice requirement, indicating that the notice requirements formally promulgated in the Federal Rules appear to govern in these jurisdictions as well.

The Fifth Circuit concurs, and has held that "particularized additional notice of the potential consequences of a summary judgment motion and the right to submit opposing affidavits need not be afforded a pro se litigant." *Martin v. Harrison County Jail*, 975 F.2d 192, 193 (5th Cir. 1992). *Martin* recognized that "the notice afforded by the Rules of Civil Procedure and the local rules" sufficiently notices a *pro se* party of the need to oppose a summary judgment motion. *Martin*, 975 F.2d at 193. In rejecting a heightened notice rule, the *Martin* court distinguished itself from other jurisdictions that have adopted the rule in various forms. *Id.* at 193 n.2 (citing *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992); *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988); *Brown v. Shinbaum*, 828 F.2d 707, 708 (11th Cir. 1987); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982); and *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975)).[4]

Of the heightened notice rules rejected by *Martin*, the D.C. Circuit and Seventh Circuit version arose from the Federal Rules' requirement that converting a Rule 12(b)(6) motion to dismiss for failing to state a claim carries with it the requirement that a plaintiff receive a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56" summary judgment proceedings. Fed. R. Civ. P. 12(b). This conversion occurs exclusively in the Rule 12(b)(6) context, and only where a district court relies on materials extrinsic to the pleading. *Id.* Both the D.C. Circuit and Seventh Circuit have held that such conversions require that the district court notify a prisoner-plaintiff of the need to respond and the time in which a response will be accepted. *Neal v. Kelly*, 963 F.2d at 456. The Seventh Circuit subsequently extended this rule to a notice requirement for all pro se litigants. *Timms v. Frank*, 953

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4. Petitioners note that these courts largely lacked the rules-promulgating guidance of the Rules Enabling Act and Federal Courts Study Act as both were enacted in 1998.

F.2d 281, 285 (7th Cir. 1992). However, both circuits' rules rest squarely on interpreting the Rule 12(b) conversion requirement.

The Fourth Circuit requires that a pro se "plaintiff be advised of his right to file counter-affidavits or other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him." *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam). The court's opinion uses terms broadly encompassing all pro se litigants, but was factually arising from a prisoner-plaintiff action. The Fourth Circuit, in application, applies this rule exclusively to prisoner-plaintiffs. *Amzura Enterprises, Inc. v. Ratcher*, 18 Fed.Appx. 95, 105 n. 11 (4th Cir. 2001). The Fourth Circuit also applies what amounts to a unique "harmless error" rule where a prisoner-litigant is knowledgeable of the rules governing summary judgment independent of receiving heightened notice. *Hummer v. Dalton*, 657 F.2d 621, 624-25 (4th Cir. 1981).

The Second Circuit follows a more expansive rule that "[t]he failure of a district court to apprise pro se litigants of the consequences of failing to respond to a motion for summary judgment is ordinarily grounds for reversal." *Ruotolo v. IRS*, 28 F.3d 6, 8 (2d Cir. 1994). The Eleventh Circuit applies its similar rule to all litigants, requiring "that an adverse party must be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default." *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985). The Eleventh Circuit also once applied this rule to motions to dismiss, though no published opinion has applied this rule subsequently. *Mitchell v. Inman*, 682 F.2d 886, 887 (11th Cir. 1982) (per curiam). Accordingly, these courts most closely approximate the *Wyatt III* rule, though even they do not require multiple heightened notices within a single action or to address a single summary judgment motion.

Accordingly, the Fifth and Sixth Circuits explicitly require only the notice required by the Federal Rules. The First, Third, Eighth, and Tenth Circuits have also never created a judicial extension to these notice provisions. In contrast, the Fourth and D.C. Circuits have judicially mandated a prisoners-only heightened notice requirement in the summary judgment context, while the Second and Seventh Circuits apply an analogous heightened notice rule to all pro se litigants. Only the Ninth and Eleventh Circuits have applied it to a Rule 12 motion not converted to summary judgment, though the Eleventh has not repeated this application in nearly 20 years. Only the Ninth Circuit has required heightened notice multiple times during the course of a single summary judgment motion, and only *Wyatt III* has recently applied this doctrine to motions to dismiss.

CONCLUSION

Petitioners respectfully request that this Court grant their petition for a writ of certiorari in order to resolve these important and divisive issues.

Respectfully submitted,

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APPENDIX A

Opinion, 305 F.3d 1033, withdrawn and superseded

United States Court of Appeals,
Ninth Circuit.

Earl Wayne WYATT, Plaintiff-Appellant,
v.
Cal A. TERHUNE; Suzan Hubbard, Warden, Defendants-Appellees.

No. 00-16568.

Argued and Submitted Dec. 4, 2001.
Filed Jan. 2, 2003.

Inmate brought § 1983 action against California Department of Corrections, alleging that prison hair-length regulations violated his constitutional and statutory rights to free exercise of religion and equal protection of the laws. The United States District Court for the Eastern District of California, Lawrence K. Karlton, J., granted summary judgment for Department on First Amendment claim and dismissed religious discrimination and equal protection claims. Inmate appealed. After denying rehearing en banc, the Court of Appeals, Fisher, Circuit Judge, held that: (1) trial court did not comply with fair notice doctrine in granting summary judgment on First Amendment claim; (2) Prison Litigation Reform Act's (PLRA) administrative exhaustion requirement creates defense to be raised and proved by defendants; and (3) alleged failure to exhaust administrative remedies under PLRA did not support dismissal of equal protection claim.

Reversed and remanded.

Opinion, 305 F.3d 1033, withdrawn and superseded.

Grace K. Won, Farella Braun & Martel LLP, San Francisco, California, for the plaintiff-appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Paul D. Gifford, Senior Assistant Attorney General, Michael J. Williams, Paul A. Bernardino, Deputy Attorneys General, Sacramento, California, for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California; Lawrence K. Karlton, Chief Judge, Presiding. D.C. No. CV-99- 00503-LKK.

Before BRIGHT, [FN*] B. FLETCHER and FISHER, Circuit Judges.

FN* The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

FISHER, Circuit Judge.

Appellant Earl Wayne Wyatt, a Rastafarian inmate, filed this
§ 1983 action challenging the California Department of Corrections' hair length regulations as a violation of his constitutional and statutory rights to free exercise of religion and equal protection of the laws. This appeal concerns three procedural issues rather than the merits of Wyatt's claims.

In addressing Wyatt's First Amendment claim, the magistrate judge assigned to the case served on the parties a copy of his findings of fact from a different case challenging the grooming regulations and directed defendants to file a summary

judgment motion. He did not explain to Wyatt, a pro se prisoner, the significance of the findings, that he intended to take judicial notice of the findings in Wyatt's case or whether or how Wyatt could dispute the findings in the summary judgment process. Once defendants filed their summary judgment motion, the magistrate judge indeed took extensive judicial notice of his prior findings and recommended that the district court grant defendants summary judgment; the district court adopted the findings and recommendation of the magistrate judge in full. On appeal, Wyatt challenges the magistrate judge's novel procedure as an improper use of judicial notice. We do not decide whether use of the prior findings--at least in some fashion--was improper use of judicial notice. Rather, we conclude the procedure adopted here was flawed because it did not meet the requirements of our fair notice doctrine, under which the district court bears the responsibility of assuring that a pro se prisoner litigant receives meaningful notice of summary judgment procedures and requirements. We therefore reverse the summary judgment on that ground.

The district court also dismissed Wyatt's religious discrimination claim under a provision of the Religious Freedom Restoration Act (RFRA) that had been declared unconstitutional. While appeal of that dismissal ***1112** was pending, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which replaces the void provisions of RFRA. We have discretion to remand a case to the district court for further consideration when new laws likely to influence a decision have become effective during the pendency of an appeal. On remand, the district court should grant Wyatt leave to amend his complaint to include a claim under RLUIPA.

The district court also granted defendants' motion to dismiss Wyatt's equal protection claim under Rule 12(b) of the Federal Rules of Civil Procedure, ruling that Wyatt had failed

to demonstrate exhaustion of the inmate appeals process before filing suit, as required by the Prison Litigation Reform Act (PLRA). Whether the PLRA exhaustion requirement is a defense or a pleading requirement is an issue of first impression in this Circuit. We adopt the rule of the majority of circuits and hold that it is a defense that must be raised and proved by the defendant. The burden of establishing nonexhaustion therefore falls on defendants. Because defendants did not meet this burden, we also reverse the dismissal of Wyatt's equal protection claim.

Facts and Procedural Background

Wyatt is an inmate incarcerated at Mule Creek State Prison in Ione, California, serving a 17-year sentence for voluntary manslaughter. As a tenet of his Rastafarian religion, Wyatt wears his hair in dreadlocks. Defendants do not dispute that Wyatt's religious beliefs are sincerely held or that dreadlocks are a means of practicing the Rastafarian religion. Seeking temporary and permanent injunctive relief, Wyatt filed this § 1983 action in pro per against Cal Terhune and Susan Hubbard ("defendants"), wardens of the prison, challenging state prison grooming regulations, Cal.Code Regs. tit. 15, § 3062(e), that require him to cut his hair. [FN1] Female inmates are not subject to the same regulations. [FN2] Wyatt has been disciplined by prison officials for refusing to comply with the regulations. Wyatt alleged that the regulations violate his First Amendment right to free exercise of religion, his Fourteenth Amendment right to equal protection of the laws and his statutory free exercise right under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* The district court adopted the findings and recommendations of the magistrate judge and dismissed Wyatt's RFRA claim because RFRA has been declared unconstitutional as applied to states, and dismissed Wyatt's equal protection claim for failure to exhaust

administrative remedies as required by the PLRA, 42 U.S.C. § 1997e(a). Adopting the findings and recommendation of the magistrate judge, who in turn had taken judicial notice of findings of fact from a similar case, the court then granted summary judgment on Wyatt's remaining First Amendment claim, ruling that the grooming regulations were rationally related to legitimate penological interests.

> FN1. The regulations provide in part: "A male inmate's hair shall not be longer than three inches and shall not extend over the eyebrows or below the top of the shirt collar while standing upright. Hair shall be cut around the ears, and sideburns shall be neatly trimmed, and shall not extend below the mid-point of the ear. The width of the sideburns shall not exceed one and one-half inches and shall not include flared ends." Cal.Code Regs. tit. 15, § 3062(e). The grooming regulations were promulgated by the California Department of Corrections as an emergency regulation on October 16, 1997.
> FN2. A "female inmate's hair may be any length"; if "hair is long, it shall be worn up in a neat, plain style, which does not draw undue attention to the inmate." *Id.* § 3062(f).

***1113** We have jurisdiction under 28 U.S.C. § 1291 and we reverse.

I. First Amendment Claim

[1] By way of an order dated February 4, 2000, the magistrate judge served a copy of his findings and recommendations in *Toyebo v. Terhune,* No. S-98- 0292 (E.D.Cal. Aug. 28, 1990), on the parties and directed defendants to file a motion for summary judgment with respect to Wyatt's First Amendment claim. [FN3] *Toyebo,* which the magistrate

judge previously had decided, involved an unsuccessful challenge to the grooming regulations by a group of Native American inmates. The magistrate judge's order did not say anything about taking judicial notice of the *Toyebo* findings or how they might otherwise be relevant to a summary judgment motion. The February 4 order did, however, refer the parties to a June 14, 1999, order of the magistrate judge that included an explanation of how Wyatt, a pro se prisoner, could oppose summary judgment and stated that facts that were not disputed would be accepted as true.

> FN3. The February 4, 2000 order states in relevant part: In another action filed in this court, *Toyebo v. Terhune,* No. CIV S-98- 0292 GEB JFM P, this court found that the plaintiffs in that action were unlikely to succeed on the merits of their First Amendment challenge to the [California Corrections Department] grooming regulations. A copy of the findings and recommendations filed in the *Toyebo* case, and a copy of the order of the district court adopting those findings and recommendations is appended to this order.
> In light of the findings in *Toyebo,* defendants will be directed to file a motion for summary judgment. Said motion shall be briefed in accordance with the provisions of Local Rule 78-230(m) and this court's order filed June 14, 1999.

Defendants filed the invited motion for summary judgment. They attached a copy of the *Toyebo* findings as an exhibit, but did not explain in their motion whether or how the findings were being proffered as evidence. At that time, Wyatt did not object to defendants' attachment of the *Toyebo* findings as an exhibit, nor did he submit evidence refuting them.

In a written report to the district court judge recommending summary judgment, the magistrate judge took

extensive judicial notice of the *Toyebo* findings. Relying on the *Toyebo* findings, the magistrate judge adopted as undisputed facts: (1) the list of defendants' justifications for the grooming regulations; (2) defendants' testimony regarding the adverse impact of accommodating religion by providing an exception to the regulations; and (3) the finding that the increase in size of the prison population had escalated the number of searches that must be conducted. [FN4] Based almost entirely on these judicially noticed findings, the magistrate judge applied the four- factor analysis for alleged violations of prisoners' constitutional rights under *Turner v. Safley*, 482 U.S. 78, 89-91, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), deemed Wyatt's case controlled
by *Friedman v. Arizona*, 912 F.2d 328 (9th Cir.1990) (upholding prison grooming regulations prohibiting facial hair), and recommended that the district court enter summary judgment in favor of defendants. The district court adopted the magistrate judge's recommendation.

> FN4. The magistrate judge took judicial notice of several other facts from *Toyebo* as well, including the penalties imposed on an inmate who fails to comply with the grooming regulations and that no religious exception exists for the grooming regulations. These facts, however, were independently supported by other evidence in the record of this case, including the regulations themselves.

Although Wyatt never formally objected to judicial notice of the *Toyebo* findings, he ***1114** did state in his objections to the magistrate judge's report:

> The Magistrate furthermore relies upon the ruling in [*Toyebo*]. Plaintiff's objections are based upon the fact the court has failed to take into consideration plaintiff's action on a case by case basis for which differs from that of *Friedman* and *Toyebo,* surrounding essential issues and arguments that differ in this action before the court.

[2] Represented by counsel in this appeal, Wyatt contends that the magistrate judge's use of the *Toyebo* findings constituted an improper procedural shortcut and that judicial notice was improper under Rule 201 of the Federal Rules of Evidence. Although we appreciate that the magistrate judge was attempting to utilize an expeditious procedure, we have held that taking judicial notice of findings of fact from another case exceeds the limits of Rule 201. *See M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir.1983) (stating general rule that "a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it"). [FN5] We need not resolve this appeal on that basis, however, because we conclude that the novel summary judgment procedure the magistrate judge adopted, without clear instructions to Wyatt on how to navigate the procedure, runs afoul of our decision in *Rand v. Rowland*, 154 F.3d 952 (9th Cir.1998) (en banc), and requires reversal.

> FN5. Factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice. *See* 21 Charles Alan Wright & Kenneth A. Graham, Jr., Federal Practice & Procedure § 5106 (Supp.2001) (stating "courts should distinguish between taking judicial notice of the truth of some extrajudicial fact recited in a court record and the use of those facts for some purpose that does not depend on the truth of

the facts recited"). In agreement with *M/V Am. Queen*, other circuits have held that a court may not take judicial notice of findings of fact from a different case for their truth. *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir.1998); *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir.1998); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082- 83 & n. 6 (7th Cir.1997); *Orix Credit Alliance, Inc. v. Delta Res., Inc. (In re Delta Res., Inc.)*, 54 F.3d 722, 726 (11th Cir.1995); *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir.1994); *Holloway v. Lockhart*, 813 F.2d 874, 878-79 (8th Cir.1987).

[3][4] Under our precedents, the district court bears the responsibility of assuring that a pro se prisoner litigant receives fair notice of summary judgment requirements. *Rand*, 154 F.3d at 960. Because of "the complexity of the summary judgment rule combined with the lack of legal sophistication of the pro se prisoner," the prisoner must obtain notice "phrased in ordinary, understandable language calculated to apprise an unsophisticated prisoner of his or her rights and obligations under Rule 56." *Id.*; *see Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir.1988) (holding that district courts are obligated to advise prisoner pro per litigants of Federal Rule of Civil Procedure 56 requirements). [FN6]

FN6. *Rand* requires that the prisoner be "informed of his or her right to file counter-affidavits or other responsive evidentiary materials and be alerted to the fact that failure to do so might result in the entry of summary judgment against the prisoner." 154 F.3d at 960. The pro se prisoner must be "informed of the effect of losing on summary judgment." *Id.* The notice also should state that if the pro se prisoner fails to controvert the moving

> party with opposing counter-affidavits or other evidence, the moving party's evidence might be taken as the truth, and final judgment may be entered against the prisoner without a trial. *Id.* at 960-61.

***1115** Assuming that the magistrate judge's June 14, 1999 order provided Wyatt with fair notice pursuant to *Rand*, the magistrate judge's February 4, 2000 order undermined that earlier notice. The latter order does not explain what purpose the *Toyebo* findings would serve, whether or how Wyatt could refute them or how they were to be reconciled with the June 14 *Rand* notice. Nor could Wyatt turn to the June 14 order for answers to these questions. That order makes no reference to any procedure to be followed when the court serves on the pro se prisoner judicial findings of fact from another case. Although the order explains the procedure Wyatt could follow to "contradict *defendant's* evidence with counteraffidavits or other admissible evidence" (emphasis added), it offers no clear guidance on whether Wyatt could refute the *Toyebo* findings and, if so, how.

[5] A *Rand* notice is ineffective when a subsequent order injects renewed uncertainty and complexity into the summary judgment procedure, creating the potential for those harms that our fair notice rule strives to avoid. When the magistrate judge issued his order of February 4, he was obligated by the principles we affirmed in *Rand* to provide Wyatt with fair notice of the significance of his act of serving the *Toyebo* findings on the parties, Wyatt's right to refute them, how to refute them and the consequences of his failure to do so.

Under the right circumstances and with a proper regard for the fairness of the proceedings, a district court is not barred from utilizing fair and proper procedures that may economize judicial resources. Pro se prison litigants, however, should not be saddled with findings from prior cases where they had no say

in the development of the record or in the strategic decisions from which that record sprang. Because the magistrate judge did not take the steps required by *Rand*, we hold that the summary judgment procedure was in error and reversal is required. [FN7]

> FN7. For similar reasons, we express concern with the magistrate judge's refusal to grant Wyatt's informal request, contained
> in his opposition to defendants' motion for summary judgment, for a stay pending discovery. The magistrate judge dismissed Wyatt's request for a stay on the ground that Wyatt had not complied with Rule 56(f). The court's June 14, 1999 order suggests that a request for a stay, whether or not in conformity with Rule 56(f), would be considered by the court, stating, "[i]f there is some good reason why such facts are not available to plaintiff when required to oppose such a motion, the court will consider a request to postpone considering defendant's motion." Wyatt's request "to stay defendants[']motion until plaintiff has been [served] with the requested discovery [responses by] defendants" appears to have complied with the June 14 order.

II. RLUIPA Claim

In his complaint, Wyatt alleged a violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. The district court dismissed the claim because *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), had declared RFRA unconstitutional as applied to the states. Subsequently, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, which provides rights similar to those delineated in RFRA. Wyatt contends that his RFRA claim should be construed as a RLUIPA claim and reinstated. Defendants argue

that RLUIPA was not pled or argued below and, therefore, is not before this court.

[6] Although we construe a pro se prisoner's pleadings liberally, *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir.2000), we decline to construe Wyatt's RFRA claim as a RLUIPA claim or to consider the merits of Wyatt's RLUIPA claim for ***1116** the first time on appeal. Nonetheless, the district court on remand should grant Wyatt leave to amend his complaint to plead a claim under RLUIPA. "This court may remand a case to the district court for further consideration when new cases or laws that are likely to influence the decision have become effective after the initial consideration." *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1285-86 (9th Cir.1981).

III. Equal Protection Claim

In his § 1983 complaint, Wyatt alleged that the prison grooming regulations violate the Equal Protection Clause of the Fourteenth Amendment because they apply to men but not to women. The district court dismissed this claim for failure to satisfy the exhaustion requirement of the Prison Litigation Reform Act (PLRA), which states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

A. *Procedural History*

Defendants raised nonexhaustion in a Rule 12 motion to dismiss, as well as pleading it as an affirmative defense. The motion argued for dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and also argued that "regardless" of whether nonexhaustion deprived the court of jurisdiction, Wyatt's complaint should be dismissed for failure to exhaust available prison remedies. Defendants now urge us to construe this motion not only as a 12(b)(1) motion to dismiss for want of subject matter jurisdiction but also as a nonenumerated Rule 12 motion to dismiss for failure to exhaust administrative remedies.

Defendants' arguments to the district court in support of dismissal reflected uncertainty over how PLRA exhaustion should be characterized. First, defendants argued as if PLRA exhaustion imposes a heightened pleading requirement on prisoners, asserting that Wyatt's equal protection claim should be dismissed because his complaint "has only provided evidence of appeal through the second level. No Director's Level appeal decision has been attached to the complaint." Alternatively, defendants appear to have perceived exhaustion as a defense that must be raised and proved by defendants. To that end, they produced two documents for the purpose of establishing that Wyatt did not exhaust administrative remedies. One is an affidavit from a prison official explaining the inmate appeals process in California. [FN8] It describes a three-level procedure, the third and final step in which is the Director's Level appeal. The affidavit, however, does not contain any information about whether Wyatt took advantage of any or all of these steps. Notably, it does not deny that Wyatt filed a Director's Level appeal. Defendants produced a second document, which they refer to as Wyatt's "Appeal Record." According to defendants, the Appeal Record shows that Wyatt has filed only one Director's Level appeal since January 1, 1994,

and that the one appeal "was for an issue other than the grooming standard and [was] submitted in January 1998." The document, however, is ambiguous on its face. It does not state that it is a complete accounting of inmate appeals filed by Wyatt, or indicate *1117 the subject of the one appeal listed. Because the affidavit also fails to explain the significance of the Appeal Record (or even to authenticate it), nothing in the record establishes that the document is what defendants say it is or that it shows what defendants contend it shows.

> FN8. For a description of California's three-tiered inmate appeal process, see *Alexandroai v. Cal. Dep't of Corr.*, 985 F.Supp. 968, 969- 70 (S.D.Cal.1997), and Cal.Code Regs. tit. 15, § § 3084.1(a) and 3084.5.

On this record, the district court--adopting the magistrate judge's findings and recommendations--dismissed Wyatt's equal protection claim for nonexhaustion. The court did not make clear, however, under what provision of the federal rules it was ordering dismissal, or explain its reason for finding nonexhaustion.

[7] To determine whether the district court's dismissal of Wyatt's equal protection claim was in error, we must address two issues: first, whether exhaustion under the PLRA imposes a pleading requirement on the plaintiff or creates a defense that must be raised and proved by the defendant; and, second, the appropriate procedural mechanism for adjudicating the existence or absence of exhaustion. Our review is, for the most part, de novo. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir.1999) (motion to dismiss); *Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir.1998) (questions of statutory interpretation). As explained below, we review the district court's factual determinations for clear error.

B. *Pleading Requirement or Defense?*

[8] The first question is whether the PLRA's exhaustion requirement imposes a pleading requirement on the prisoner or creates a defense that must be raised and proved by the defendant. [FN9] Those circuits to have considered this question have reached different answers. The Sixth Circuit imposes the burden on the prisoner. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir.1998) (per curiam). To satisfy § 1997e(a) in the Sixth Circuit, the prisoner must allege that he exhausted all available administrative remedies and should attach to his complaint the administrative decision, if it is available, showing the disposition of the administrative claim. *Id.* Five other circuits--the Second, Third, Seventh, Eighth and D.C.--have described exhaustion as an affirmative defense that must be raised and proved by the defendant. *See Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir.2002); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir.2001); *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C.Cir.2001); *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir.1999); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir.1999).

> FN9. We recognize a third possibility. A statutory exhaustion requirement may be jurisdictional. *See, e.g., B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099-1100 (9th Cir.2002) (treating the exhaustion requirement under Title VII as jurisdictional). As we have held previously, however, the PLRA exhaustion requirement does not affect our subject matter jurisdiction. *See Rumbles v. Hill*, 182 F.3d 1064, 1068 (9th Cir.1999). Accordingly, our Title VII jurisprudence does not affect the analysis here.

[9] Like these five circuits, we do not believe the PLRA imposes a pleading requirement. In reaching a contrary conclusion, the Sixth Circuit emphasized the strong language of

§ 1997e(a), which begins "[n]o action shall be brought." *Toombs*, 139 F.3d at 1104. Such language, however, is inconclusive. As one court has observed, "[t]he language of statutes of limitations tend[s] to be equally imperative," *Jackson v. District of Columbia*, 89 F.Supp.2d 48, 56 (D.D.C.2000), *vacated and remanded on other grounds by* 254 F.3d 262 (D.C.Cir.2001), yet it is well-settled that statutes of limitations are affirmative defenses, not pleading requirements. *E.g.*, Fed.R.Civ.P. 8(c); *see also Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir.1999) (likening exhaustion ***1118** under the PLRA to a statute of limitations).

Indeed, as the Supreme Court recently affirmed, we will not impose heightened pleading requirements where Congress has not expressly instructed us to do so. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (holding that a complaint in an employment discrimination lawsuit need not contain specific facts establishing a prima facie case of discrimination under the *McDonnell Douglas* standard). Writing for a unanimous Court, Justice Thomas explained that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions." *Id.* at 998. [FN10] In rejecting the lower court's imposition of a heightened pleading requirement, the Court observed that Rule 8(a)'s simplified pleading standard must be read in conjunction with Rule 8(e)(1), which states that "[n]o technical forms of pleading or motions are required." *Id.* The "limited exceptions" are those that are *explicit*, such as Rule 9(b), which expressly "provides for greater particularity in all averments of fraud or mistake." *Id.* [FN11] Thus, "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.' " *Id.* at 999 (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)).

FN10. Rule 8(a) provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief."

FN11. Rule 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

We do not discern in § 1997e(a) the kind of express congressional command referred to in *Swierkiewicz* and exemplified by Rule 9(b). [FN12] Legislatures know how to indicate that exhaustion is a pleading requirement when they want to. *See, e.g.*, *Walton v. Nalco Chem. Co.*, 272 F.3d 13, 20-21 (1st Cir.2001) ("Section 4622 [of the Maine Human Rights Act], by its plain language, precludes any characterization of the [administrative] exhaustion issue as a mere affirmative defense, since it explicitly states that the plaintiff, rather than the defendant, must 'plead[ ]' the requisite [administrative] filing.") (footnotes omitted). The PLRA, of course, contains no such command. *See Ray*, 285 F.3d at 297 ***1119** (holding that the PLRA does not impose a heightened pleading requirement and stating that "courts should narrowly interpret statutory language to avoid heightened
pleading standards").

FN12. In *Toombs*, 139 F.3d at 1104, the Sixth Circuit characterized PLRA exhaustion as a "condition precedent" to suit within the meaning of the special pleading requirement of Rule 9(c). *See* Fed.R.Civ.P. 9(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."). We do not think that Rule 9(c) has any application here, however. *See, e.g.*, *EEOC v. Guar. Sav. & Loan Ass'n*,

369 F.Supp. 36, 37 (D.Ala.1973) (holding that Rule 9(c) applies to conditions precedent to liability but not to matters that affect jurisdiction); *Snyder v. Le Roy Dyal Co.*, 1 F.R.D. 362, 362 (S.D.N.Y.1940) (holding that Rule 9(c) applies to conditions going to create liability or those which construct a legal capacity to sue but does not require any allegation that procedural requirements have been fulfilled); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1303 (stating that Rule 9(c) "applies only to conditions 'precedent,' not to performance of procedural requirements for filing the claim"). Even if PLRA exhaustion were a condition precedent within the meaning of Rule 9(c), we would not be compelled to agree with the Sixth Circuit. As we have said previously, "Rule 9(c) does not expressly require that performance of conditions be pled, it merely sets forth the manner in which such pleadings should be made." *Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (9th Cir.1998).

Moreover, imposing a technical pleading requirement without express congressional authorization would be contrary to the liberal approach we take to pleadings by pro se prisoners. *See, e.g.*, *United States v. Ten Thousand Dollars ($10,000.00) in U.S. Currency*, 860 F.2d 1511, 1513 (9th Cir.1988) ("We have consistently held in this circuit that courts should liberally construe the pleadings and efforts of pro se litigants, particularly 'where highly technical requirements are involved.' ") (quoting *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir.1984)). In addition, prison officials are likely to have greater legal expertise and, as important, superior access to prison administrative records in comparison to prisoners, especially, as is often the case, when prisoners have moved from one facility to another. We agree with the Third Circuit, which has observed that "it is considerably easier for a prison

administrator to show a failure to exhaust than it is for a prisoner to demonstrate exhaustion." *Ray*, 285 F.3d at 295.

[10] We therefore agree with five other circuits that nonexhaustion under § 1997e(a) of the PLRA does not impose a pleading requirement. We hold that § 1997e(a) creates a defense--defendants have the burden of raising and proving the absence of exhaustion. [FN13]

FN13. Defendants contend that characterizing PLRA exhaustion as a defense is irreconcilable with *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001), and *McNeil v. United States*, 508 U.S. 106, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993). We disagree. *Booth* held that administrative remedies must be exhausted even where the plaintiff seeks only monetary relief and the inmate grievance procedure offers no such relief. 532 U.S. at 733-34, 121 S.Ct. 1819. The opinion did not address the procedural posture of the case or comment on whether PLRA exhaustion is a pleading requirement or defense. *McNeil* held that the district court properly dismissed a claim under the Federal Tort Claims Act (FTCA) where the suit was filed before completion of the administrative review process but where the process was completed before the motion to dismiss was filed. 508 U.S. at 110, 113 S.Ct. 1980. Again, the Court did not address whether the FTCA's exhaustion requirement was a defense or a pleading requirement. Moreover, the case involved an exhaustion requirement that the lower court determined was jurisdictional in nature, whereas PLRA exhaustion is not a jurisdictional requirement.

C. *The Proper Pretrial Motion for Establishing Nonexhaustion*

[11][12][13][14][15] We next address the form of pretrial motion to be used to resolve the State's contention that the prisoner has failed to exhaust his administrative remedies. In this Circuit, we have held that the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment. *See* *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir.1988) (per curiam); *see also* *Inlandboatmens Union of the Pac. v. Dutra Group*, 279 F.3d 1075, 1078 n. 1, 1083-84 (9th Cir.2002); *Stauffer Chem. Co. v. FDA*, 670 F.2d 106, 108 (9th Cir.1982); *Studio Elec. Technicians Local 728 v. Int'l Photographers of the Motion Picture Indus. Local 659*, 598 F.2d 551, 552 n. 2 (9th Cir.1979). These decisions are based on the general principle that "[s]ummary judgment is on the merits," *Stauffer Chem.*, 670 F.2d at 108, whereas "dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits." *Heath v. Cleary*, 708 F.2d 1376, 1380 n. 4 (9th Cir.1983). In deciding a motion to dismiss for a failure to exhaust ***1120** nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact. *See* *Ritza*, 837 F.2d at 369. [FN14] If the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice. *See* *id.* at 368 & n. 3.

> FN14. For the reasons discussed in Section I of this opinion, if the district court looks beyond the pleadings to a factual record in deciding the motion to dismiss for failure to exhaust--a procedure closely analogous to summary judgment--then the court must assure that Wyatt has fair notice of his opportunity to develop a record.

D. *Application to the Facts Here*

[16] It is not clear that the district court dismissed Wyatt's equal protection claim employing the proper legal standard or reached a factual finding that was not clearly erroneous. Defendants argued in the district court, consistent with the Sixth Circuit's position, that the burden of establishing exhaustion fell on Wyatt and that Wyatt failed to attach documents establishing exhaustion to his complaint. We have rejected treating PLRA exhaustion as a pleading requirement or requiring exhaustion to be established by the complaint. Accordingly, if the district court dismissed Wyatt's claim on this ground, we must reverse.

[17] Assuming in the alternative that the district court relied on the documentary evidence produced by defendants, the court's factual finding that Wyatt failed to exhaust nonjudicial remedies was clearly erroneous. *See Ritza*, 837 F.2d at 369 (holding that we will review the district court's factual determinations for clear error and its application of substantive law de novo). The documents produced by defendants are inadequate to establish that Wyatt failed to exhaust California's administrative review process. The affidavit, although describing the inmate appeals process, does not state whether or not Wyatt has exhausted his appeals. There is no evidence in the record establishing that the "Appeal Record" is what defendants say it is. We cannot tell from the record whether that document is a complete record of Wyatt's Director's Level appeals. Nor does the record establish that the one appeal shown on the document relates to a subject other than the prison grooming regulations challenged here. Defendants have failed to meet their burden of establishing that Wyatt did not exhaust administrative remedies. [FN15]

FN15. The documents produced by defendants are inadequate. Further factual development of the record

is required. We note that both parties will be able to offer additional evidence on remand. Wyatt's supplemental brief to this Court states that he has a letter from the Director of Prisons that confirms he has exhausted his remedies to the third and final level. This and any other evidence should be evaluated by the district court.

[18] A third possibility is that the district court inferred from Wyatt's making a futility argument that he conceded nonexhaustion. A prisoner's concession to nonexhaustion is a valid ground for dismissal, so long as no exception to exhaustion applies. The record is not clear, however, that Wyatt has conceded that he did not exhaust administrative remedies.

We therefore vacate the order dismissing Wyatt's equal protection claim and remand for further proceedings.

Conclusion

We reverse the summary judgment on Wyatt's First Amendment claim and the Rule 12 dismissal of Wyatt's equal protection claim as unexhausted and remand for further proceedings. On remand, the district court also should grant Wyatt leave to ***1121** amend his complaint to include a claim under RLUIPA.

REVERSED and REMANDED.

315 F.3d 1108, 54 Fed.R.Serv.3d 694, 3 Cal. Daily Op. Serv. 42, 2003 Daily Journal D.A.R. 106

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EARL WAYNE WYATT, No. CIV S-99-0503 LKK JFM P

Plaintiff, ORDER

vs.

(Filed December 1, 1999)

CAL TERHUNE, et al.,

Defendants.

_____/

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On October 18, 1999, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed October 18, 1999, are adopted in full;

2. Defendants' August 11, 1999 motion to dismiss is denied as to plaintiff's First Amendment claim and granted as to all other claims;

3. Defendants shall file an answer to plaintiff's First Amendment claim within ten days from the date of this order; and

4. Plaintiff's March 15, 1999 motion for preliminary injunction is denied.

DATED: Nov 30, 1999.

/s/ Lawrence K. Karlton
UNITED STATES
MAGISTRATE JUDGE

United States District Court
for the
Eastern District of California
December 1, 1999

* * CERTIFICATE OF SERVICE * *

2:99-cv-00503

Wyatt

v.

Terhune

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 1, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Earl Wayne Wyatt
C-80121
Mule Creek State Prison
PO Box 409000
Ione, CA 95640

SJ/LKK

CF/JFM

Kathleen Elizabeth Gnekow
Attorney General's Office of the State of California
PO Box 944255
1300 I Street, Suite 125
Sacramento, CA 94244-2550

Jack L. Wagner, Clerk

/s/ [Illegible]

By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EARL WAYNE WYATT,

Plaintiff,

vs.

CAL TERHUNE, et al.,

Defendants.

_____/

No. CIV S-99-0503 LKK JFM P

FINDINGS & RECOMMENDATIONS

(Filed Oct. 18, 1999)

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that his First Amendment right to religious freedom and his Fourteenth Amendment right to equal protection of the laws are being violated by grooming regulations promulgated and implemented by defendants, the Director of the California Department of Corrections (CDC) and the Warden of Mule Creek State Prison (Mule Creek). Specifically, plaintiff claims that the regulations unconstitutionally burden the requirements of his Rastafarian faith, which include the wearing of long hair, and that the regulations impose greater restrictions on males than females and therefore are discriminatory in violation of the equal protection clause. Plaintiff also claims that defendants have also violated his right to the protection of the Fifth Amendment's Double Jeopardy clause by reimposing on plaintiff a previously withdrawn punishment for failing to comply with the grooming regulations. Finally, plaintiff contends that the punishment imposed for failing to comply with the

grooming regulations will extend his release date by two years.[5] Plaintiff has moved for injunctive relief, and defendants have moved to dismiss the action for failure to exhaust administrative remedies.

I. Defendants' Motion to Dismiss

Defendants have moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), contending that the court lacks subject matter jurisdiction because plaintiff has failed to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a). Plaintiff contends that administrative exhaustion would be futile.

Section 1997e(a) of Title 42 of the United States Code provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). The exhaustion requirement of § 1997e(a) is not jurisdictional. Rumbles v. Hill, 182 F.3d 1064, 1067 (9th Cir. 1999). It is, however, mandatory. Id. at 1066.

Plaintiff has not exhausted administrative remedies. He argues, however, that findings by this court in another action,

---

5. Plaintiff also includes a claim under the Religious Freedom and Restoration Act (RFRA). However, the United States Supreme Court has held that RFRA is unconstitutional as applied to the states. See City of Boerne v. Flores, 521 U.S. 507 (1997) (discussed in Sutton v. Providence St. Joseph Medical Center, 1999 WL 7184666 (9th Cir., Sept. 16, 1999)).

Toyebo v. Terhune, No. CIV S-98-0292 GEB JFM P, demonstrate that administrative exhaustion would be futile. In Toyebo, this court found after an evidentiary hearing that no CDC official is empowered to grant a religious exemption from the grooming regulations at issue and, therefore that administrative exhaustion of a First Amendment claim would be futile. (Toyebo v. Terhune, Findings and Recommendations filed August 20, 1998, at 3-4 & n.3.) A copy of the Toyebo findings and recommendations is appended to these findings and recommendations.[6] For the reasons set forth therein, plaintiff should not be required to administratively exhaust his First Amendment claim before proceeding with that claim in this action.

Neither the record in Toyebo nor the record in this action, however, permit a similar finding with respect to plaintiff's other claims. Plaintiff has not demonstrated that administrative remedies are unavailable for either his equal protection clause claim or his claims arising out of the punishment imposed for his non-compliance with the regulations.[7]

For the foregoing reasons, defendants' motion to dismiss should be granted as to all claims except plaintiff's First Amendment claim and denied with respect to that claim.

---

6. A copy of the district court's September 28, 1998 order adopting the findings and recommendations in Toyebo is also appended.

7. The allegations of plaintiff's complaint suggest that defendants once corrected punishment imposed on plaintiff for non-compliance with the grooming regulations. See Complaint, at 4.

II. Plaintiff's Motion for Injunctive Relief

Plaintiff seeks injunctive relief in the form of an order requiring defendants to cease all adverse action against him and to restore to plaintiff all privileges and programs he was afforded prior to his non-compliance with the grooming regulations.

The legal principles applicable to a request for injunctive relief are well established. To prevail, the moving party must show either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant's favor. See Coalition for Economic Equity v. Wilson, 122 F.3d 692, 700 (9th Cir. 1997); Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374, 1376 (9th Cir. 1985). The two formulations represent two points on a sliding scale with the focal point being the degree of irreparable injury shown. Oakland Tribune, 762 F.2d at 1376. "Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury." Id. In the absence of a significant showing of possible irreparable harm, the court need not reach the issue of likelihood of success on the merits. Id.

For the reasons set forth in this court's findings and recommendations in Toyebo, the law of this circuit requires the court to find that it is highly unlikely that plaintiff will succeed on his First Amendment claim. See Toyebo, Findings and Recommendations at 11-15, citing Friedman v. State of Arizona, 912 F.2d 328, 331 (9th Cir. 1990), cert. denied sub nom., Naftel v. Arizona, 498 U.S. 1100 (1991). For this reason, a preliminary injunction cannot be issued on plaintiff's First Amendment claim.[8]

---

8. Injunctive relief is not proper on plaintiff's other claims because they must be dismissed for the reasons set forth in Section I.

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Defendants' August 11, 1999 motion to dismiss be denied as to plaintiff's First Amendment claim and granted as to all other claims;

2. Defendants be directed to file an answer to plaintiff's First Amendment claim within ten days from the date of any order by the district court adopting these findings and recommendations;

3. Plaintiff's March 15, 1999 motion for preliminary injunction be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections with the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 13, 1999.

/s/ John F. Moulds
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAMIAN TOYEBO, et al., No. CIV S-98-0292 GEB JFM P

Plaintiffs, FINDINGS & RECOMMENDATIONS

vs.

(Filed August 20, 1998)

C. A.TERHUNE, et al.,

Defendants.

_____/

Plaintiffs are three Native American state prisoners proceeding through counsel with a civil rights action pursuant to 42 U.S.C. § 1983. The complaint was filed on February 13, 1998. Plaintiffs are challenging the California Department of Corrections' (CDC or Department) new grooming policy claiming it violates their religious beliefs by requiring them to cut their hair. Defendants are the Director of the CDC and the wardens of the prisons in which plaintiffs are incarcerated. By orders filed March 24, 1998, and May 7, 1998, the district court issued temporary restraining orders prohibiting defendants from enforcing the grooming policy against the plaintiffs in this action. This matter is before the court on defendants' motion to dismiss and plaintiffs' motion for preliminary injunction.

BACKGROUND

On October 16, 1997, the CDC promulgated what it styled an emergency regulation setting forth new grooming standards for inmates housed at all CDC institutions. The regulation, codified at California Code of Regulations, title 15, section 3062(e), provides, inter alia, that hair be cut to no longer

than three inches in length. Under the new emergency grooming regulation, if a prisoner fails to comply, he faces punitive sanctions, including progressively harsher disciplinary actions, such as housing and program reassignments, suspension of privileges, limitation of family visitation, disciplinary detention or confinement, loss of good time earning status, and forfeiture of earned good time credit.[1] There are no religious exemptions to the regulation.

DEFENDANTS' MOTION TO DISMISS

On April 15, 1998, defendants filed a motion to dismiss this action on two separate grounds. First, they contend that the court lacks subject matter jurisdiction because plaintiffs have not exhausted their administrative remedies as required by section 1997e of Title 42 of the United States. Second, they contend that the court should abstain from exercising jurisdiction and either dismiss the state law claims or exercise its discretion to dismiss the entire case. The motion came on regularly for hearing on May 22, 1998. Jay Peterson and Donya Fernandez appeared as counsel for plaintiffs. Jane Lamborn, Deputy Attorney General, appeared as counsel on behalf of defendants.

I. Motion to Dismiss for Failure to Exhaust Administrative Remedies

Section 1997e(a) of Title 42 of the United States Code provides:

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner

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1. Cal. Code Regs., tit. 15 § 3062(e) (amended)("Grooming Standards"); § 3062(m) (amended), § 3014(e) (amended) (f)(D) (amended).

> confined in any jail, prison, or other corrections facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Defendants contend that plaintiffs have not exhausted available administrative remedies and that this court therefore lacks jurisdiction over this action.

The jurisdictional aspect of the exhaustion argument is readily dealt with. While there is no binding authority on point from this circuit, a number of courts have already held that the language of § 1997e is not of the sort to deprive a district court of jurisdiction. See e.g., Wright v. Morris, 111 F.3d 414 (6th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 263 (1997); Palomino v. Stanton, No. C 96-2984, 1997 WL 350099 (N.D. Cal. 1997); Lacey v. C.S.P. Solano Medical Staff, et al., 990 F.Supp. 1199 (E.D. Cal. 1997).

Defendants contend that the action should be dismissed because plaintiffs have not exhausted the internal grievance procedure of the CDC, title 15 California Code of Regulations §§ 3084 et seq., before bringing this action. Before bringing this action, in accordance with California Government Code section 11340.6 which provides, inter alia, that any interested person may petition a state agency to request the amendment or repeal of a regulation, plaintiff Toyebo petitioned the CDC and requested a religious exemption to the grooming regulation on behalf of all American Indian prisoners. The CDC rejected plaintiff Toyebo's petition on December 15, 1997 and its decision was published in the California Regulatory Law Bulletin ("CRLB"). See 97-52 CRLB 763 (Barclays 1997). Plaintiff Toyebo then requested the CDC to reconsider its decision under section 11340.7(e) of the California Government Code. On January 21, 1998 the CDC denied his request and its decision was published in the CRLB. See 989-6 CRLB 90 (Barclays 1998). The regulations were adopted without

providing for any religious exemption. It is undisputed that no CDC official has an authority to grant a religious exemption from the grooming regulation for any inmate.[2]

Upon consideration of the record herein, the court finds that by requesting creation of a religious exemption and reconsideration of the denial of that request, plaintiffs have exhausted all administrative remedies available to them. There is no offi8cial in the prison grievance system with authority to grant an individual prisoner a religious exemption and no further administrative remedy available for the claims at bar.[3] For these reasons, defendants' motion to dismiss for failure to exhaust administrative remedies should be denied.

II. The Motion to Dismiss on Abstention Grounds

Defendants contend that this court should abstain from deciding this case pursuant to abstention doctrines set forth in Younger v. Harris, 401 U.S. 37 (1971), Railroad Comm'd v. Pullman Co., 312 U.S. 496 (1941) and Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976). Defendants' contentions are without merit.

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2. David Tristan, Deputy Director for Institutions Division and all three wardens of the institutions where plaintiffs are incarcerated testified that they are not empowered to grant religious exemptions under the regulation as promulgated. (Warden Ratelle Deposition at 156, lines 21-25; Tristan Deposition Vol. II at 93, lines 16-19, Tristan Deposition Vol. II at 94, lines 1-4; Warden Clarke Deposition at 52, lines 22-24; Warden Hubbard Deposition at 76, lines 1-7; Tristan Testimony on Direct, April 9, 1998 Evidentiary Hearing at 85; lines 20-23; at 86, lines 21-24).

3. For the same reason, exhaustion of individual grievances through the prison grievance system would be futile; it is plaine that all such grievances would be rejected.

"[F]ederal courts have a 'virtually unflagging obligation' to exercise jurisdiction where it exists." Martinez v. Newport Beach City, 125 F.3d 777, 780 (9th Cir. 1997) (quoting Miofsky v. Superior Court of the State of California, 703 F.3d 332, 338 (9th Cir. 1983)). That obligation is "particularly weighty" where, as here, the plaintiffs present claims under the Civil Rights Act, 42 U.S.C. § 1983. Miofsky, 703 F.2d at 338 (quoted in Martinez, 125 F.3d at 781-82. "Abstention from the exercise of federal jurisdiction is the exception, no the rule." Colorado River, 424 U.S.C. at 813. The question raised by defendants' motion is whether this case nonetheless presents one of the exceptional circumstances that require abstention from the exercise of that jurisdiction.

"Younger abstention is proper where: (1) there are ongoing state judicial proceedings; (2) that implicate important state interests; and (3) there is an adequate opportunity in the state proceedings to raise federal questions." Martinez, 125 F.3d at 781. "Younger's scope is closely circumscribed to parties actually involved in state litigation; even the presence of co-plaintiffs representing identical interests in state proceedings does not extend Younger to parties not actually involved in the proceedings." Benavidez v. Eu, 34 F.3d 825, 832 (9th Cir. 1994). Plaintiffs in this action are not parties to any state action.[4] Younger abstention is therefore not proper in this case.

"Pullman abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions. Abstention is appropriate when: (1) the federal plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a

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4. Defendants argue that plaintiffs can intervene in any of a number of pending state actions, but they offer no authority for the proposition that the doctrine of Younger abstention requires that they do so.

definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear." The San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1104 (9th Cir. 1998). Pullman abstention is generally limited to cases in which the questions of state law are intertwined with the question of federal law. See San Remo Hotel, 145 F.3d at 1100. The state law claims raised herein are separate from the federal constitutional claims. Pullman abstention is not required.

Colorado River abstention "is to be applied on an even more limited basis than the traditional abstention doctrines" and only in "'exceptional circumstances.'" Martinez 125 F.3d at 784 (quoting Colorado River, 424 U.S. at 813). Factors which support abstention under this doctrine include "the desirability of avoiding piecemeal litigation, the inconvenience of the federal forum, . . . the order in which jurisdiction was obtained by the concurrent forums, . . . whether the source of the governing law is state or federal, and . . . whether the state court proceedings could adequately protect the federal plaintiff's rights." Martinez, 125 F.3d at 784. Although the plaintiff's claims could be raised in state court proceedings, none of the other factors weigh in favor of abstention, and this case does not present the type of exceptional circumstances that would warrant abstention under Colorado River.

For all of the foregoing reasons, defendants' motion to dismiss should be denied.

PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION

An evidentiary hearing on plaintiffs' motion for a preliminary injunction was held on April 1, and April 2, 1998. Donya Fernandez, John Arai Mitchel, and Jay Peterson appeared as counsel on behalf of plaintiffs. Jane Lamborn,

Deputy Attorney General, appeared on behalf of defendants. All three plaintiffs testified as did two expert witnesses called by plaintiff and two expert witnesses called by defendants. On April 20, 1998, plaintiffs filed their post hearing brief. On May 8, 1998, defendants filed their responsive post hearing brief. On May 19, 1998, plaintiffs filed their reply.

Plaintiffs seek a preliminary injunction prohibiting defendants from enforcing the hair length provisions of the new grooming regulation against them. Plaintiffs raise four federal constitutional claims in their first amended complaint: first, that the regulation deprives them of the right to free exercise of their religion in violation of the First and Fourteenth Amendments; second, that the regulation deprives them of their due process rights in violation of the Fourteenth Amendment by revoking any good time credit earned by plaintiffs and reassignment plaintiffs to non-credit earning status because of their religious beliefs and practices; third, that the regulation deprives them of their substantive due process rights in violation of the Fourteenth Amendment by subjecting them to the coerced cutting of their hair and thereby infringing upon their fundamental rights to privacy and bodily integrity; and fourth, that the regulation deprives them of their equal protection rights in violation of the Fourteenth Amendment because the grooming standards prohibit male prisoners from wearing their hair long, while female prisoners retain the option of doing so. Plaintiffs also raise several state law claims. Plaintiffs seek injunctive relief on the basis of their first and third claims for relief, both of which are predicated on the federal constitution, and on their sixth and eighth claims for relief, which are based on provisions of the California constitution.[5]

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5. Plaintiffs do not rely on either their federal procedural due process claim or their federal equal protection claim to support their motion for injunctive relief. The court will not, therefore, address those claims at this time.

I. Preliminary Injunction Standards

The legal principles applicable to a request for injunctive relief are well established. To prevail, the moving party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the moving party's] favor." Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 521, 523 (9th Cir. 1985) (quoting Apple Computer Inc. v. Formula Int'l, 725 F.2d 521, 523 (9th Cir. 1984)); see also Hartikka v. United States, 754 F.2d 1516, 1518 (9th Cir. 1985). The two formulations represent two points on a sliding scale with the focal point being the degree of irreparable injury shown. Oakland Tribune, 762 F.2d at 1376. "Under either formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable harm, the court need not reach the issue of likelihood of success on the merits. Id.

II. Plaintiffs' Legal Claims

A. Plaintiffs' First Amendment Claim

1. Legal Standards

"Among the rights prisoners possess is the right to the free exercise of religion, subject to limitations justified by the considerations underlying or penal system." Malik v. Brown, 16 F.3d 330, 332 (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987)). First Amendment protection is afforded to claims based on sincerely held religious beliefs. Malik, 16 F.3d at 333. To warrant protection, the belief or practice at issue must be central to religious faith. See Graham v. C.I.R., 822 F.2d 844, 850-51 (9th Cir. 1987), aff'd 490 U.S. 680 (1989). However, constitutional protection is limited by the deference afforded to prison administrators; "when a prison regulation

impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78 (1987).

Four factors are assessed to determine whether a prison regulation is reasonably related to legitimate penological interests:

> (1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it;
>
> (2) whether alternative means of exercising the right on which the regulation impinges remain open to prison inmates;
>
> (3) the impact that accommodation of the asserted right will have on guards, other inmates, and prison resources; and
>
> (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimus cost to valid penological interests.

Friedman v. State of Arizon, 912 F.2d 328, 331 (9th Cir. 1990) (quoting Harper v. Wallingford, 877 F.2d 728, 732 (9th Cir. 1989)), cert. denied sub nom., Naftel v. Arizona, 498 U.S. 1100 (1991).

2. Application

a. Sincerity of Plaintiffs' Belief

At the evidentiary hearing, plaintiffs, who have hair longer than allowed by the new regulations, testified that they are Native Americans who have a sincere religious belief that

their hair is sacred and that they are unable to comply with the hair cutting provisions of the regulations because of their religious belief. (See April 1, 1998 Transcript of Evidentiary Hearing (hereafter "R.T."), at 9-102)

Defendants presented no evidence to rebut plaintiffs' showing that they are sincere in their religious beliefs. This court finds that plaintiffs' religious beliefs are sincerely held.

b. Centrality of Long Hair to Native American Religion

Plaintiffs have also shown that wearing long hair is a central tenet of their religion. In addition to their own testimony, plaintiffs submitted the sworn affidavit of Deward Walker, a professor of ethnic studies and anthropology at the University of Colorado, in which Dr. Walker explained:

> For most traditional American Indians, hair is closely connected to one's innermost being and has important social and religious significance. Hair is a central aspect of one's person, constitutes part of one's identity as an Indian person, and can be a major requirement for participation in religious life. It is widely believed among American Indians that hair has a sacred religious significance. Hair is an external manifestation of inner spirituality. A threat to a practitioner's hair is a threat to his spiritual and social identity and general well being.
>
> Among traditional American Indians, hair is often worn in a religiously prescribed manner.
>
> . . .

> One's hair is usually cut only as a sign of mourning for deceased relatives or as a personal sacrifice made as part of a sacred vow. Hair is rarely, if ever, cut for other reasons and should be allowed to grow according to tribal traditions and sacred prescriptions.

(Declaration of Deward E. Walker, Jr., Ph.D., at 90-91; see also April 1, 1998, R.T. at 155.)[6] Ronald J. Wermuth, an expert on Native American culture presented by defendants, confirmed that, though not required, long hair is central to the spiritual practice of Native American religion. (Transcript of Proceedings, April 2, 1998, at 160-61, 169-70.) There is no serious dispute that having long hair is a central tenet of plaintiffs' religious faith.

Based on careful consideration of the evidence in the record, this court finds that the CDC grooming policy interferes with a practice central to plaintiffs' sincere religious faith, and hence with plaintiffs' First Amendment rights. The court must now, therefore, examine whether the regulation is nonetheless valid under the standards set forth in Turner v. Safley, supra.

c. Reasonableness of the Grooming Policy

i. Logical Connection to Legitimate Penological Interests

The Department advances the following penological interests as justification for the grooming policy:

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6. The fact that long hair also has a social significance does not diminish its sacred nature of Native American Religion.

> Legitimate penological interests support uniform grooming standards which assist in the identification of particular inmates who are outside of their approved area; by aiding in the identification of prisoners who are responsible for creating disturbances; and to assist in the apprehension and identification of escapees.
>
> Prison restrictions on hair length assist correctional officers in searches of inmates for concealment of contraband including dangerous materials, reduce the difficulty and time needed to conduct searches, and aid in the promotion of hygienic and healthy living conditions inside the prisons.
>
> . . .
>
> Reasons supporting grooming standards are: (1) discipline and respect for authority requires that individual members of the institutional sub-society accede to the needs for quick identification of persons and gender; (2) health and safety require hygienic conditions and the ability to make effective use of safety devices e.g. eye shields, headgear, and face masks; (3) instead of animosity among members displaying their individual loyalties or preferences requires a more uniform appearance [sic]; and (4) security requires the ability to efficiently search/detect weapons and other contraband.

(Exhibit A to Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, filed February 25, 1998.) David Tristan, the Deputy Director for the Institutions Division of the CDC, testified at the evidentiary

hearing concerning these justifications and the support for them. (April 2, 1998, RT, passim.)

Plaintiffs offered the testimony of a correctional expert, George Earl Sullivan, who has forty-three years of experience in the corrections field. Mr. Sullivan testified that neither the Federal Bureau of Prisons nor forty of the fifty states have restrictive grooming policies. (April 1, 1998, R.T. at 182-185.) He testified, based on his experience, that the grooming policy was not necessary to advance penological interests asserted as justification therefor. (Id., passim. He specifically testified that "there is no prison security or penological justification for requiring short hair on the basis of prisoner identification, or to preclude or assist in the apprehension of an escape. These are not, again, cause/effect relationships. There, are, are illusionary justifications for a new policy that simply have [sic] no basis in operational fact as far as

prison management is concerned, in my opinion." Id. at 201.) He offered similar testimony about other proffered justifications. (Id. at 192-93 (cleanliness and hygiene); 195-200 (contraband).)

Courts are required to give deference to security concerns expressed by prison officials. Harper v. Wallingford, 877 F.2d at 733 (citing cases). Moreover, in Friedman, the court of appeals held that prison officials are not required to justify regulations by reference to "concrete evidence;" reference to "anticipated security problems" is sufficient. Friedman, 912 F.2d at 332. Specifically, the Friedman court noted that Turner v. Safley "requires that courts allow prison officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.'" Id. at 332-33 (quoting Turner, 482 U.S. at 89.

In Friedman, the United States Court of Appeals for the Ninth Circuit held that a grooming policy regulating the length of beards served legitimate penological interests where the state of Arizona offered testimony that the policy aided in the rapid and accurate identification of inmates, thereby fostering "(1) orderly conduct of day-to-day activities; (2) identification of prisoners responsible for disturbances; (3) apprehension of escapees." Friedman, 912 F.2d at 331-32. Defendants have offered substantially identical justifications here. In light of Friedman, this court is compelled to find that defendants have established a logical connection between their grooming policy and legitimate penological justifications.

ii. Alternatives for Free Exercise of Native American Religion

The second prong of Turner requires the court to examine whether plaintiffs retain alternative means of practicing their religious faith. Under Friedman, this test "is not the weighing of what religious practices take the place of [wearing long hair.]" Id. at 332. Rather the inquiry is whether plaintiffs retain their ability to participate in other Native American religious practices, or, instead, whether they have been "denied 'all means of expression' of their religion." Id.

All three plaintiffs testified that there is no substitute for long hair in their religious practice and no evidence was presented to the contrary. That, however, is not the inquiry as set forth in Friedman. Rather, the inquiry is whether cutting their hair denies them all means of expressing their religious faith. Plaintiffs each testified that they participate in purification and pipe ceremonies. (April 1, 1998, R.T. at 17-18 (Alto), 44 (Toyebo), 84 (Stoneroad).) Plaintiff Alto testified that long hair is not required for participation in those ceremonies. (Id. at 31.) Given the test described in Friedman, in the absence of evidence that cutting the plaintiffs' hair denied

them all means of expressing their Native American religious faith, the court must find that the second Turner factor does not weight against the regulation at issue.

iii. Impact of Accommodation

The third Turner factor requires assessment of the impact that accommodation of plaintiffs' First Amendment right will have on guards, other inmates, and prison resources. David Tristan testified that CDC officials considered religious exemption but came to the conclusion that it would be extremely difficult to administer such an exemption; in particular, he testified that they determined it would be very difficult to establish whether long hair was a fundamental tenet of specific religions, and whether a particular inmate had a sincerely held religious belief that required an exemption. (April 2, 1998, R.T. at 86.) He also testified, however, that the CDC has mechanisms for identifying inmate membership in particular religious faiths, particularly when they are received into the CDC, and that they try to accommodate religious practices consistent with institutional security. (Id. at 87-88.)

Defendants also argue that accommodating these plaintiffs will have a "ripple effect" and cause other inmates to seek accommodation. This effect is not weighted heavily, however, because it "is always present when special accommodation are made for religious beliefs." Ashelman v. Wawrzaszek, 111 F.3d 674, 677 (9th Cir. 1997). Defendants have not presented persuasive evidence that accommodation of plaintiffs' First Amendment rights would have a harmful effect on prison security or resources. Cf. Friedman, 912 F.2d at 332 (testimony that accommodation will "flood prison officials" with claims to the religious faith and/or practice being accommodated and that guards will have more difficulty identifying prisoners is sufficient to favor the reasonableness of a grooming regulation.)

iv. Availability of Ready Alternatives

The final Turner factor requires the court to assess whether there are "ready alternatives that fully accommodate the prisoner's rights at de minimus cost to valid penological interests." "The absence of ready alternative is evidence of the reasonableness of a prison regulation,' [citation omitted], while the existence of alternatives may be 'evidence that the [policy] is not reasonable but is an 'exaggerated response' to prison concerns.'" Ward v. Walsh, 1 F.3d 873, 879 (9th Cir. 1993) (quoting Turner, 482 U.S. at 90-91), cert. denied, 510 U.S. 1192 (1994).

Plaintiffs contend that the following alternatives exist: maintaining current identification photographs, taking photographs of long-haired inmates with their hair pulled back, conducting routine hair searches, and restricting facial hair only. (Plaintiffs' Post-Hearing Brief, filed April 20, 1998, at 20.) Defendants argue that none of these alternatives can be accomplished at de minimus cost to the security, health and safety issues proffered to justify the grooming policy.

This court is persuaded that some of the alternatives suggested by plaintiffs would be easy and obvious. The law, however, is otherwise. In Friedman, the court of appeals rejected a contention that photographing inmates with and without a beard could be accomplished at de minimus cost to security interests, because an inmate could always change his appearance after the photograph was taken. That reasoning preclud3es this court from finding that photograph alternatives are easy, obvious alternatives to the grooming policy. Moreover, defendants presented testimony that the increase in size of the inmate population has increased dramatically the number of searches that must be conducted; this evidence

precludes the court from finding that additional searches could be accomplished at de minimus.

3. Conclusion

The court finds that plaintiffs are sincere in their religious beliefs, that long hair is central to their spiritual practice, and that defendants' grooming policy impinges on the free exercise of their religion. In this court's view, however, the decision in Friedman, which is authority that binds this court, precludes this court from finding that defendants' grooming policy is unreasonable. Absent the decision in Friedman, this court would readily find from this record that the majority of reasons tendered to support the regulation are post hoc rationalizations and that defendants' grooming policy is exaggerated response to the proffered concerns. Nonetheless, the law of this circuit as set forth in Friedman requires this court to conclude that defendants' grooming policy is reasonably related to legitimate penological interests and, therefore, that plaintiffs are unlikely to succeed on the merits of their claim that the grooming policy impermissibly infringes on their federal constitutional right to free exercise of religion.

B. Substantive Due Process

Plaintiffs also claim that the grooming regulation violates their right to bodily integrity protected by the due process clause of the federal constitution. Assuming arguendo that substantive due process rights are implicated by involuntary hair cutting, the plaintiffs have not demonstrated a likelihood that they will prevail on this claim.

"The Ninth Circuit has set forth factors to consider in determining whether substantive due process has been violated:

> 'In determining whether substantive due process rights have been violated, we will look to such factors as the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm.'"

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409 (9th Cir. 1989) (citations omitted), cert. denied, 494 U.S. 1016 (1990). In view of the findings in section I, infra, and the fact that there is no evidence that the grooming regulation was enacted for the purpose of causing harm, there is little chance that plaintiffs will succeed on their substantive due process claim.

C. Threat of Irreparable Harm/Balance of Hardships

It is plain to this court that enforcement of the grooming regulations will substantially injure the plaintiffs' right to free exercise of their religious beliefs, and that the balance of hardships tips in favor of the plaintiffs. However, for the reasons set forth above, it is highly unlikely that plaintiffs will succeed on the merits of either their First Amendment or their substantive due process claim. Under the circumstances, a preliminary injunction cannot be issued.

D. State Law Claims

Plaintiffs also support their motion for injunctive relief with two claims predicated on the California Constitution. However, this court cannot issue an injunction against state officials solely on the basis of alleged violations of state law. See Pennhurst State School & Hospital v. Halderman, 45 U.S. 89 (1984).

Accordingly, IT IS HEREBY RECOMMENDED THAT:

1. Defendants' April 13, 1998 motion to dismiss be denied; and

2. Plaintiffs' February 25, 1998 motion for preliminary injunction be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). The parties are cautioned that no extensions of time to file objections to these findings and recommendations will be granted.

DATED: August 19, 1998.

/s/ John F. Moulds
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAMIAN TOYEBO, et al., No. CIV S-98-0292 GEB JFM P

Plaintiffs, ORDER

vs.

(Filed September 28, 1998)

C. A.TERHUNE, et al.,

Defendants.

_____/

Plaintiffs are three state prisoners proceeding through counsel with this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On August 20, 1998, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within ten days. Plaintiffs and defendants have filed objections to the findings and recommendations, and the parties have each filed a reply to the other's objections.[1]

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted

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1. On September 22, 1998, defendants filed a request for an extension of time until September 25, 1998 to file their reply. The request was granted. Defendants submitted a reply on September 25, 1998.

a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed August 20, 1998 are adopted in full;

2. Defendants' April 13, 1998 motion to dismiss is denied; and

3. Plaintiffs' February 25, 1998 motion for preliminary injunction is denied.

DATED: September 28, 1998.

/s/ John F. Moulds
UNITED STATES
MAGISTRATE JUDGE

United States District Court
for the
Eastern District of California
September 28, 1998

* * CERTIFICATE OF SERVICE * *

2:98-cv-00292

Toyebo

v.

Terhune

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 28, 1998, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jay Bixby Petersen — SF/GEB
California Indian Legal Services
510 16th Street — CF/JFM
Suite 301
Oakland, CA 94612-1500

Jane L. Lamborn
Attorney General's Office of the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Jack L. Wagner, Clerk

/s/ [Illegible]
By: Deputy Clerk

United States District Court
for the
Eastern District of California
October 14, 1999

* * CERTIFICATE OF SERVICE * *

2:99-cv-00503

Wyatt

v.

Terhune

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 14, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Earl Wayne Wyatt
C-80121
Mule Creek State Prison
PO Box 409000
Ione, CA 95640

CF/JFM

SJ/LKK

Kathleen Elizabeth Gnekow
Attorney General's Office of the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Jack L. Wagner, Clerk

/s/ K. Carlos
By: Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EARL WAYNE WYATT,

Plaintiff,

vs.

CAL TERHUNE, et al.,

Defendants.

/

No. CIV S-99-0503 LKK JFM P

FINDINGS & RECOMMENDATIONS

(Filed May 11, 2000)

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that his First Amendment right to religious freedom is being violated by grooming regulations promulgated and implemented by defendants, the Director of the California Department of Corrections (CDC) and the former Warden of Mule Creek State Prison (Mule Creek).[1] Specifically, plaintiff claims that the regulations unconstitutionally burden the requirements of his Rastafarian faith, which include the wearing of dreadlocks.

1. Plaintiff's other challenges to the grooming regulations were dismissed for failure to exhaust administrative remedies. (See Order filed December 1, 1999, at 2.)

This matter is before the court on defendants' motion for summary judgment.[2]

SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion,

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2. Plaintiff has included in his opposition to defendants' motion an assertion that defendants have failed to provide him with "additional discovery" that are "key elements" to his claim. Plaintiff asks that the court deny defendants' summary judgment motion or stay disposition thereof until plaintiff has been served with the requested discovery. Plaintiff has failed to comply with the requirements of Rule 56(f) of the Federal Rules of Civil Procedure. His request for a stay of this motion will therefore be denied.

against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987); and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W.

Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable infer4ences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F.Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a reational trier of fact to find the for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

On June 14, 1999, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, ___ U.S. ___, 119 S. Ct. 2392 (1999); Klingele v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

ANALYSIS

I. Undisputed Facts

The grooming regulation at issue was promulgated by the CDC on October 16, 1997, as an emergency regulation. It provides, inter alia, that the hair of male prisoners be cut to no longer than three inches in length. Cal. Code Regs., tit. 15 § 3062(e). Under the new emergency grooming regulation, if a prisoner fails to comply, he faces punitive sanctions, including progressively harsher disciplinary actions, such as housing and program reassignments, suspension of privileges, limitation of family visitation, disciplinary detention for confinement, loss of good time earning status, and forfeiture of earned good time credit. Id. at § 3062(m), (n); Toyebo v. Terhune, No. CIV S-98-0292 GEB JFM P, Findings and recommendations, filed August 20, 1998, at 2.[3] There is no religious exemption to the regulation. Cal. Code Regs., tit. 15 § 3062(h)(2); Toyebo Findings and Recommendations, at 2, 4.

Plaintiff asserts that he is a sincere member of the Rastafarian faith, and that a tenet of that faith forbids the cutting of his hair. Plaintiff has been found guilty of two administrative violations and one serious rules violation for refusing to cut his hair. On January 26, 1999, he was assigned to "C" status based on the latter serious rules violation. "C" status inmates are generally confined to their cells with the exception of time for yard release, dayroom activities, and meals. Their access to institutional programs is limited to weekdays from 10:00: a.m. to 12:00 p.m., and they are

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3. A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). On February 4, 2000, the parties to this action were served with a copy of this court's findings and recommendations filed in the Toyebo case.

limited to their cells on weekends and holidays except for breakfast and dinner.

II. Legal Standards

"Among the rights prisoners possess is the right to the free exercise of religion, subject to limitations justified by the considerations underlying our penal system." Malik v. Brown, 16 F.3d 330, 332 (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987)). First Amendment protection is afforded to claims based on sincerely held religious beliefs. Malik, 16 F.3d at 333. To warrant protection, the belief or practice at issue must be central to religious faith. See Graham v. C.I.R., 822 F.2d 844, 850-51 (9th Cir. 1987), aff'd 490 U.S. 78 (1987).

Four factors are assessed to determine whether a prison regulation is reasonably related to legitimate penological interests:

> (1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it;
>
> (2) whether alternative means of exercising the right on which the regulation impinges remain open to prison inmates;
>
> (3) the impact that accommodation of the asserted right will have on guards, other inmates, and prison resources; and
>
> (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests.

Friedman v. State of Arizona, 912 F.2d 328, 331 (9th Cir. 1990)

(quoting Harper v. Wallingford, 877 F.2d 728, 732 (9th Cir. 1989)), cert. denied sub nom., Naftel v. Arizona, 498 U.S. 1100 (1991).

For purposes of this summary judgment motion, it appears undisputed that plaintiff is sincere in his Rastafarian religious faith and that among the central tenets of the Rastafarian faith is a prohibition on cutting hair. The question before the court is whether the grooming policy, which plainly impinges on that tenet, is nonetheless valid.

1. Logical Connection to Valid Penological Interests

The CDC has advanced several justifications for the grooming regulations:

> Legitimate penological interests support uniform grooming standards which assist in the identification of particular inmates who are outside of their approved area, by aiding in the identification of prisoners who are responsible for creating disturbances; and to assist in the apprehension and identification of escapees.
>
> Prison restrictions on hair length assist correction officers in searches of inmates for concealment of contraband including dangerous materials, reduce the difficulty and time needed to conduct searches, and aid in the promotion of hygienic and healthy living conditions inside the prisons.
>
> . . .

> Reasons supporting grooming standards are: (1) discipline and respect for authority require that individual members of the institutional sub-society accede tot he needs for quick identification of persons and gender; (2) health and safety require hygienic conditions and the ability to make effective use of safety devices e.g. eye shields, headgear, and face masks; (3) instead of animosity among members displaying their individual loyalties or preferences requires a more uniform appearance [sic]; and (4) security requires the ability to efficiently search/detect weapons and other contraband.

Toyebo Findings and Recommendations, at 10 (citation omitted).[4]

Courts are required to give deference to security concerns expressed by prison officials. Harper v. Wallingford, 877 F.2d at 733 (citing cases). Moreover, in Friedman, the court of appeals held that prison officials are not required to justify regulations by reference to "concrete evidence;" reference to "anticipated security problems" is sufficient. Friedman, 912 F.2d at 332. Specifically, the Friedman court noted that Turner v. Safley "requires that courts allow prison officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.'" Id. at 332-33 (quoting Turner, 482 U.S. at 89).

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4. This court conducted an evidentiary hearing in the Toyebo case on a motion for preliminary injunction. At the hearing, David Tristan, the Deputy Director for the Institutions Division of the CDC, testified concerning these justifications and the support for them. (Toyebo v. Terhune, Reporter's Transcript (RT), April 2, 1998, passim.)

In Friedman, the United States Court of Appeals for the Ninth Circuit held that a grooming policy regulating the length of beards served legitimate penological interests where the state of Arizona offered testimony that the policy aided i the rapid and accurate identification of inmates, thereby fostering "(1) orderly conduct of day-to-day activities; (2) identification of prisoners responsible for disturbances; (3) apprehension of escapees." Friedman, 912 F.2d at 331-32. The CDC has offered substantially identical justifications here. In light of Friedman, this court is compelled to find that defendant has established a logical connection between their grooming policy and legitimate penological justifications.

2. Alternatives for Free Exercise of Rastafarian Religions

The second prong of Turner requires the court to examine whether plaintiff retains alternative means of practicing his religious faith. Under Friedman, this test "is not the weighing of what religious practices take the place of [wearing long hair.]" Id. at 332. Rather, the inquiry is whether plaintiff retains his ability to participate in other Rastafarian religious practices, or, instead, whether he has beer "denied 'all means of expression' of their religion.'" Id.

Plaintiff has presented no evidence that he has been denied all means of expressing his religious faith Given the test described in Friedman, in the absence of evidence that requiring plaintiff his hair denied him all means of expressing his Rastafarian religious faith, the court must find that the second Turner factor does not weigh against the regulation at issue.

3. Impact of Accommodation

The third Turner factor requires assessment of the impact that accommodation of plaintiffs' First Amendment right will have on guards, other inmates, and prison resources. At the evidentiary hearing in Toyebo,

> David Tristan testified that CDC officials considered a religious exemption but came tot he conclusion that it would be extremely difficult to administer such an exemption; in particular, he testified that they determined it would be very difficult to establish whether long hair was a fundamental tenet of specific religions, and whether a particular inmate had a sincerely held religious belief that required an exemption. (April 2, 1998, RT at 86.) He also testified, however, that the CDC has mechanisms for identifying inmate membership in particular religious faiths, particularly when they are received into the CDC, and that they try to accommodate religious practices consistent with institutional security. (Id. at 87-88.)

Toyebo, Findings and Recommendations at 12. Defendant has presented no new evidence from that presented in the Toyebo case. This court was not persuaded then and is not persuaded now that accommodation of plaintiff's First Amendment rights would have a harmful effect on prison security or resources. Cf. Friedman, 912 F.2d at 332 (testimony that accommodation will "flood prison officials" with claims to the religious faith and/or practice being accommodated and that guards will have more difficulty identifying prisoners is sufficient to favor the reasonableness of a grooming regulation.)

4. Availability of Ready Alternatives

The final Turner factor requires the court to assess whether there are "ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests." "'The absence of ready alternatives is evidence of the reasonableness of a prison regulation,' [citation omitted], while the existence of alternatives may be 'evidence that the [policy] is not reasonable but is an 'exaggerated response' to prison concerns.'" Ward v. Walsh 1 F.3d 873, 879 (9th Cir. 1993) (quoting Turner, 482 U.S. at 90-91), cert. denied, 510 U.S. 1192 (1994).

Plaintiff contends that he can and will wear his long hair tied back, and that he has agreed to shave his face even though his faith also requires that he wear a beard. (Plaintiff's Opposition to Defendents [sic] Motion for Summary Judgment, filed March 16, 2000, at 11.) Defendants, however, contend that if male inmates are allowed to wear long hair tied back the "would still be able to quickly and easily manipulate their appearance and contraband could still be maintained within the long hair." (Defendants' Motion for Summary Judgment, filed February 18, 2000, at 11.)

As it was in Toyebo, this court is persuaded that the alternative suggested by plaintiff, as well as others, would be easy and obvious. The law, however, is otherwise. In Friedman, the court of appeals rejected a contention that photographing inmates with and without a beard could be accomplished at de minimis cost to security interests, because an inmate could always change his appearance after the photograph was taken. That reasoning precludes this court from finding that tying hair back is an easy, obvious alternative to the grooming policy. Moreover, in Toyebo, this court is an easy, obvious alternative to the grooming policy. Moreover, in Toyebo defendants presented testimony that the increase in size

of the inmate population has increased dramatically the number of searches that must be conducted; this evidence precludes the court from finding that additional searches could be accomplished at de minimus cost.

5. Conclusion

For purposed of this summary judgment motion, there is no dispute that plaintiff is sincere in his religious beliefs, that wearing dreadlocks is central to his spiritual practice, and that defendants' grooming policy impinges on the free exercise of his religion. In this court's view, however, the decision in Friedman, which is authority that binds this court, precludes this court from finding that defendants' grooming policy is unreasonable. As the court noted in Toyebo,

> Absent the decision in Friedman, this court would readily find from this record tha the majority of reasons tendered to support the regulation are post hoc rationalizations and that defendants' grooming policy is an exaggerated response to the proffered concerns. Nonetheless, the law of this circuit as set forth in Friedman requires this court to conclude that defendants' grooming policy is reasonably related to legitimate penological interests and, therefore, that plaintiffs are unlikely to succeed on the merits of their claim that grooming policy impermissibly infringes on their federal constitutional right to free exercise of religion.

(Toyebo, Findings and Recommendations, at 14.) For this reason, the court must recommend that defendants' motion for summary judgment be granted.[5]

In accordance with the above IT IS HEREBY RECOMMENDED THAT:

1. Plaintiff's March 16, 2000 request for denial or a stay of defendants' motion for summary judgment be denied;

2. Defendants' February 18, 2000 motion for summary judgment be granted; and

3. This action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The

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5. Defendants also contend that they are entitled to qualified immunity from liability for damages on plaintiff's First Amendment claim. Because they are entitled to judgment on the merits of this claim, the court has not reached the question of qualified immunity.

In addition, in his opposition to defendants' summary judgment motion, plaintiff contends that the regulations have also unlawfully extended the length of his incarceration because when he was placed on "C" Status he lost the opportunity to earn time credits. Claims relating to the length of duration of an inmate's confinement must be raised by petition for writ of habeas corpus. See Preiser v. Rodriguez, 411U.S. 475 (1973).

parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 10, 2000.

/s/

UNITED STATES
MAGISTRATE JUDGE

APPENDIX D

305 F.3d 1033

United States Court of Appeals,
Ninth Circuit.

Earl Wayne WYATT, Plaintiff-Appellant,
v.
Cal A. TERHUNE; Suzan Hubbard, Warden, Defendants-Appellees.

No. 00-16568.

Sept. 23, 2002.

Earl Wayne Wyatt, Ione, CA, pro se.

Grace Won, Farella, Braun and Martel, San Francisco, CA, for Plaintiff- Appellant.

Kathleen E. Gnekow, Paul A. Bernardino, Sacramento, CA, for Defendants- Appellees.

Before: BRIGHT, [FN*] B. FLETCHER and FISHER, Circuit Judges.

FN* The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

ORDER

The panel has voted to deny appellee's petition for rehearing and reject the suggestion for rehearing en banc, filed February 26, 2002.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R.App. P.35.

The petition for rehearing and suggestion for rehearing en banc, filed February 26, 2002, is DENIED.

The opinion filed on February 12, 2002, and published at 280 F.3d 1238 (9th Cir.2002), is WITHDRAWN.

APPENDIX E

315 F.3d 1108

United States Court of Appeals,
Ninth Circuit.

Earl Wayne WYATT, Plaintiff-Appellant,
v.
Cal A. TERHUNE; Suzan Hubbard, Warden, Defendants-Appellees.

No. 00-16568.

Dec. 31, 2002.

Earl Wayne Wyatt, Ione, CA, Grace Won, Esq., Farella, Braun and Martel, San Francisco, CA, for Plaintiff-Appellant.

Kathleen E. Gnekow, Esq., Paul A. Bernardino, Esq., Sacramento, CA, for Defendant-Appellee.

Before BRIGHT, [FN*] B. FLETCHER and FISHER, Circuit Judges.

FN* The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

ORDER

The panel has voted to deny appellee's petition for rehearing en banc, received October 8, 2002 and filed November 27, 2002.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing en banc, received October 8, 2002 and filed November 27, 2002, is DENIED.

The opinion filed September 23, 2002, and published at 305 F.3d 1033 (9th Cir.2002), is WITHDRAWN.

315 F.3d 1108, 3 Cal. Daily Op. Serv. 24.

Supreme Court, U.S.
FILED
JUN 9 ~ 2003
OFFICE OF THE CLERK

No. 02-1486

IN THE

Supreme Court of the United States

EDWARD ALAMEIDA, *et al.*,

Petitioners,

v.

EARL WYATT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

DOUGLAS R. YOUNG
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QUESTIONS PRESENTED

1. Whether the Court should disturb the rule that failure to exhaust administrative remedies is an affirmative defense under the Prison Litigation Reform Act to be plead and proven by the defense.

2. Whether the Court should disturb the rule that *pro se* prisoner litigants must be provided with "fair notice" of Fed. R. Civ. P. 56 summary judgment procedures prior to entering summary judgment against them.

PARTIES TO THE PROCEEDING

Respondent Wyatt agrees with the description of Petitioners[1] and Respondent set forth in the Petition for Writ of Certiorari, except that Wyatt's California Department of Corrections No. is C-80121. Wyatt resides in Mule Creek State Prison, California.

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1. Petitioners may be alternatively referred to herein as the "State of California" or the "State."

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Respondent Earl Wyatt ("Wyatt") respectfully requests that this Court deny the Petition for Writ of Certiorari, which seeks review of the Ninth Circuit's opinion captioned and published as *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003) ("*Wyatt III*").[2]

OPINIONS AND ORDERS ENTERED BELOW

Wyatt concurs with the list of published and unpublished opinions, orders and citations in this case, as set forth at page 1 of Petitioners' brief.

STATEMENT OF JURISDICTION

On December 31, 2002, the Ninth Circuit denied the State's second and final Petition for Rehearing. (App. 72-73.)[3] On January 2, 2003, the Ninth Circuit issued *Wyatt III*. (App. 1.) On April 1, 2003, Petitioner filed its Petition for Writ of Certiorari, seeking this Court's review of *Wyatt III*.

Because the State's Petition for Writ of Certiorari was filed more than 90 days following December 31, 2002 when the Ninth Circuit denied the State's Petition for Rehearing, the Petition for Writ of Certiorari is untimely pursuant to Supreme Court Rule 13, depriving this Court of jurisdiction. 28 U.S.C. § 2101; *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (90 day time-limit is "mandatory and jurisdictional" and cannot be extended "except as Congress permits"); *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952) (amendment of appellate court opinion does not start the clock anew where no substantive change has occurred).

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2. The *Wyatt v. Terhune* chronology is more fully set forth in the Statement of the Case, *infra*.

3. The Appendices to the Petition for Writ of Certiorari are abbreviated in the citations herein as "App."

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1997e(a) [Prison Litigation Reform Act].

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

2. 28 U.S.C. § 2111.

> Harmless Error: On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

On March 15, 1999, Respondent Wyatt filed a Section 1983 *pro se* complaint against Cal Terhune and Susan Hubbard, the wardens of the Mule Creek State Prison in Ione, California. Wyatt, a practicing Rastafarian, contended that a statewide prison guideline that required him to cut his hair to within three inches of his scalp violated his First, Fifth and Fourteenth Amendment rights, 42 U.S.C. § 2000bb-1 (Religious Freedom Restoration Act ("RFRA"))[4], California Code of Regulations, Title 15, § 3062(e) and (f) and the California Penal Code §§ 5054, 5058.

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4. In 2000, Congress replaced RFRA, which had been invalidated by this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), with the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"). The Ninth (Cont'd)

On August 11, 1999, contending that Wyatt had failed to exhaust his administrative remedies, the State filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). On October 18, 1999, Magistrate Judge John F. Moulds issued Findings and Recommendations ("Findings No. 1") in which he: (a) dismissed all of Wyatt's claims for failure to exhaust, except for his First Amendment claim, which the court found exempt from the exhaustion requirement on grounds of futility and (b) denied Wyatt's request for a preliminary injunction. Wyatt timely objected to Findings No. 1 on November 5, 1999. On December 1, 1999, the district court conducted a *de novo* review, adopted the magistrate judge's Findings No. 1 and ordered the State to answer Wyatt's remaining claim.

On February 4, 2000, the magistrate judge directed the State to file a motion for summary judgment in light of the magistrate judge's findings and recommendations in an unrelated case, *Toyebo v. Terhune*, Case No. S-98-0292 GEB JFM (E.D. Cal. Aug. 28, 1990), which addressed the same grooming guidelines, except as applied to Native American inmates. The State filed a motion for summary judgment on February 18, 2000, and on May 11, 2000, the magistrate judge issued Findings and Recommendations ("Findings No. 2") granting the State's motion. Wyatt filed an objection to the magistrate's Findings No. 2 on June 6, 2000. On June 18, 2000, the district court conducted a *de novo* review of the magistrate judge's Findings No. 2 and adopted them in full. Judgment was entered against Wyatt that same day.

(Cont'd)

Circuit ordered the district court to permit Wyatt to amend his complaint to replace his RFRA claim with one based on RLUIPA. *Wyatt III*, 315 F.3d at 1115-1116. That portion of *Wyatt III* is not the subject of the State's Petition.

On July 27, 2000, Wyatt filed a timely notice of appeal to the Ninth Circuit challenging both the district court's orders (a) granting the motion to dismiss his claims and (b) granting the State's motion for summary judgment. On February 12, 2002, the Ninth Circuit (Fisher, J.) reversed, determining that Wyatt's equal protection claim should not have been dismissed for failure to exhaust administrative remedies because exhaustion is an affirmative defense, which the State did not carry the burden of proving either by review of the pleadings or by consideration of extrinsic evidence. The Ninth Circuit also determined that summary judgment on Wyatt's First Amendment free exercise claim should not have been entered because Wyatt did not receive "fair notice" of summary judgment procedures and requirements, and because even if he did, the district court improperly took judicial notice of crucial facts without which the summary judgment decision could not stand. *Wyatt v. Terhune*, 280 F.3d 1238 (9th Cir. 2002) ("*Wyatt I*").

On September 23, 2002, the Ninth Circuit denied the State's first petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit also revised its original opinion without substantive change, issuing *Wyatt v. Terhune*, 305 F.3d 1033 (9th Cir. 2002) ("*Wyatt II*"). On December 31, 2002, the Ninth Circuit denied the State's second petition for rehearing *en banc* and entered judgment in favor of Wyatt. The Ninth Circuit also revised its first amended opinion without substantive change, issuing *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. January 2, 2003) ("*Wyatt III*"). It was not until April 1, 2003 that the State filed its Petition for Writ of Certiorari, seeking review of *Wyatt III*.

REASONS FOR DENYING THE PETITION

Petitioners mischaracterize the state of the law among the circuits on the issue of administrative exhaustion under the Prison Litigation Reform Act ("PLRA"), asserting that it is "badly fractured." In fact, a clear majority rule exists and was followed by the Ninth Circuit below, holding that exhaustion of administrative remedies is an affirmative defense for purposes of the PLRA. *See Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002) (following the "vast majority of circuit courts [that] have characterized PLRA exhaustion as an affirmative defense"). Petitioners instead ask this Court to adopt a heightened pleading standard based on anomalous authority from the Sixth Circuit. *See Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002) (discussing the Sixth Circuit's "heightened pleading standard"). The Ninth Circuit's sensible decision to follow the clear majority rule does not merit this Court's review.

Petitioners also inaccurately portray the Ninth Circuit as out of step with other circuits for adhering to the longstanding principle of providing *pro se* prisoner litigants with "fair notice" of federal summary judgment procedures under Federal Rule of Civil Procedure 56. The Ninth Circuit's application of this principle is in accordance with numerous other circuits that have addressed the issue and is, in fact, more conservative than the approach followed by several of them. For this additional reason, *Wyatt III* is wholly unremarkable and does not merit this Court's review.

I.

THE PETITION SHOULD BE DENIED BECAUSE *WYATT III* IS IN ACCORD WITH THE OVERWHELMING MAJORITY RULE, WHICH PROVIDES THAT THE EXHAUSTION REQUIREMENT UNDER THE PLRA IS AN AFFIRMATIVE DEFENSE

A. The Vast Majority Of Circuit Courts Agree That Exhaustion Under The PLRA Is An Affirmative Defense

Petitioners misrepresent the state of PLRA exhaustion law among the circuits by characterizing it as "badly fractured." (Pet. at 7.)[5] In fact, nearly every circuit court to address the issue has concluded that exhaustion under the PLRA constitutes an affirmative defense. *See Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) ("We hold that § 1997e(a) creates a defense – defendants have the burden of raising and proving the absence of exhaustion."); *Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002) (adopting the "majority rule" that PLRA exhaustion is an affirmative defense); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002) ("We thus join the many other circuits that have held that failure to exhaust is an affirmative defense to be pleaded by the defendant."); *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C. Cir. 2001) (discussing whether defendants waived the *affirmative defense* of exhaustion under the PLRA); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) ("[T]he assertion that a plaintiff prisoner failed to exhaust all available administrative remedies as required under the PLRA is an affirmative defense under Fed. R. Civ. P. 8(c)."); *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999)

5. The Petition for Writ of Certiorari is abbreviated in the citations herein as "Pet."

("A prisoner's failure to exhaust administrative remedies before filing a claim constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure."); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999) ("[A] defendant in a prisoner 1983 suit may also assert as an affirmative defense the plaintiff's failure to comply with the PLRA's requirements."); *see also Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir. 1998) (explaining that the PLRA "imposes a[n] [exhaustion] requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling").

The only circuit court to reach a contrary conclusion is the Sixth Circuit, which held in *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998) that the PLRA imposes a heightened pleading standard with respect to exhaustion of administrative remedies. According to *Brown*, prisoners bringing § 1983 claims "must allege and show that they have exhausted all available state administrative remedies." *Id.* at 1104. The Sixth Circuit further described these pleading requirements as follows:

> We held [in *Brown*] that in order to effectuate [the PLRA's exhaustion requirement], a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.

Knuckles-El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000). The Sixth Circuit has explicitly referred to this as a "heightened pleading standard." *Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002).

The Ninth Circuit's uncontroversial decision to follow the overwhelming majority rule does not merit this Court's review. Every circuit to take a position on the issue, except the Sixth, has held either explicitly or implicitly that PLRA exhaustion is an affirmative defense that must be pled and proven by the defendant. Furthermore, the Sixth Circuit's position is an anomaly that appears to conflict with this Court's recent unanimous decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002),[6] in which this Court reiterated that courts may not require greater particularity in pleading than the Federal Rules of Civil Procedure require.[7] It also runs afoul of the general principle that technical pleading requirements should be applied liberally to *pro se* prisoners. *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

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6. Petitioners state that the circuits in the majority are "silent on the application of *Swierkiewicz*." (Pet. at 7.) Since none of those courts imposed a heightened pleading standard, however, they had no reason to discuss *Swierkiewicz*.

7. In *Baxter*, the Sixth Circuit attempted to distinguish *Swierkiewicz* on the ground that *Baxter* "does not take its authority from the Federal Rules of Civil Procedure, but from the Prison Litigation Reform Act." 305 F.3d at 490. Given that the PLRA does not specify the manner for *pleading* exhaustion, however, the Sixth Circuit's opinion is difficult to reconcile with this Court's holding that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz*, 534 U.S. at 515 (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)).

B. Intra-Circuit Authority Is Uniform In Adhering to the Principle That PLRA Exhaustion Is an Affirmative Defense

As part of their attempt to obscure the existence of an overwhelming majority rule, Petitioners suggest that the opinions within the seven circuit courts that comprise the majority have either been less than uniform in interpreting PLRA exhaustion as an affirmative defense or based on dicta. (Pet. at 7-8.) An even cursory analysis of the relevant case law reveals that neither is true. These circuits have consistently and unambiguously determined that exhaustion is an affirmative defense under the PLRA.

Petitioners begin by questioning the significance of the Second Circuit's view because they contend it is derived from dicta in *Jenkins*. (Pet. at 7.) District courts within the Second Circuit, however, have uniformly interpreted *Jenkins* as setting forth the rule of this circuit that exhaustion under the PLRA is an affirmative defense. *See Torrence v. Pesanti*, 239 F. Supp. 2d 230, 232-33 (D. Conn. 2003) ("This court agrees that, in the Second Circuit, the failure to exhaust administrative remedies under the PLRA is an affirmative defense analogous to a statute of limitations defense."); *Abney v. County of Nassau*, 237 F. Supp. 2d 278, 280 (E.D.N.Y. 2002) ("The Second Circuit has construed the PLRA exhaustion requirement as an affirmative defense."); *Reyes v. Punzal*, 206 F. Supp. 2d 431, 433 (W.D.N.Y. 2002) ("I also recognize that in the Second Circuit, failure to comply with the PLRA's exhaustion requirement is viewed as an affirmative defense, *see Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999), and that accordingly, defendant bears the burden of proving plaintiff's failure to comply with the exhaustion requirement."); *John v. N.Y.C. Department of Corrections*, 183 F. Supp. 2d 619, 624 (S.D.N.Y. 2002)

("Failure to comply with the exhaustion requirement is an affirmative defense."); *Hallett v. New York State Department of Correctional Services*, 109 F. Supp. 2d 190, 196 (S.D.N.Y. 2000) ("[I]n the Second Circuit, failure to comply with the PLRA's exhaustion requirement is viewed as an affirmative defense."). Furthermore, the Second Circuit held in a case decided after *Jenkins* that before a court may *sua sponte* dismiss a prisoner complaint for failure to exhaust administrative remedies under the PLRA, it must give the prisoner notice and an opportunity to be heard. *See Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999). Such a holding is irreconcilable with a rule requiring a prisoner to establish exhaustion in his or her pleading.[8] Accordingly, the Second Circuit is unquestionably in accord with the majority rule.[9]

Petitioners also accuse the Seventh Circuit of being "internally divided," (Pet. at 7), based on one passage taken out of context from *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000), in which the court stated that "dismissal on the pleadings is proper for failure to plead the exhaustion of administrative remedies." In *Massey v. Wheeler*, however, the plaintiff *conceded* in his complaint that he had not exhausted his administrative remedies. *Id.* at 1034. Accordingly, the court dismissed his complaint under

8. In another case decided subsequent to *Jenkins*, the Second Circuit again referred to exhaustion under the PLRA as an affirmative defense. *See Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000).

9. Thus, Petitioners disparagement of *Massey* and *Foulk* for "deriv[ing] their view from dicta in *Jenkins*" has no merit. Moreover, as a factual matter, Petitioners' assertion that *Massey* and *Foulk* "derive their view" from *Jenkins* is not accurate. In *Massey*, the court cites not only to *Jenkins* but also to a prior Seventh Circuit case, *King v. Cooke*, 26 F.3d 720, 724 (7th Cir. 1994), in support of the principle that exhaustion is an affirmative defense. *See Massey*, 196 F.3d at 735. As for *Foulk*, the court does not cite or even refer to *Jenkins*. Rather, Petitioners' argument is apparently discerned from the fact that *Foulk* relies on *Massey* which, in turn, cited to *Jenkins*.

Rule 12(b)(6) without considering evidence concerning exhaustion. *Id.* at 1034. *Massey v. Wheeler* in no way contradicts the Seventh Circuit authority of *Massey v. Helman*.

Petitioners additionally point out that two Seventh Circuit cases – *Smith v. Zachary*, 255 F.3d 446 (7th Cir. 2001) and *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999) – describe exhaustion as a "precondition" to suit, presumably offering further support for their contention that the Seventh Circuit is "internally divided." (Pet. at 7.) A brief analysis of these cases, however, makes clear that this is a red herring.

Smith did not address or even make reference to the question of whether exhaustion is an affirmative defense. Rather, the case analyzed whether the use of excessive force is a "prison condition" within the meaning of the PLRA. *See Smith*, 255 F.3d at 448-53.

Petitioner's reliance on *Perez* is even more disingenuous, as *Perez* clearly treats exhaustion as an affirmative defense. The court states,

> The [PLRA] gives prisons and their officials a valuable entitlement – the right not to face a decision on the merits – which courts must respect *if a defendant chooses to invoke it. . . . Defendants may waive or forfeit reliance on § 1997e(a), just as they may waive or forfeit the benefit of a statute of limitations.*

Perez, 182 F.3d at 536 (emphasis added).[10]

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10. As a general matter, the use of the word "precondition" is of no consequence. Satisfying a statute of limitations is also a "precondition" to suit, yet a statute of limitations is an affirmative defense. *See Wyatt*, 315 F.3d at 1117 (likening exhaustion under the PLRA to a statute of limitations); *Perez*, 182 F.3d at 536 (same).

The State's critique of the Third Circuit is also misleading. Petitioners contend that *Ray* is "inconsistent with the facts underlying [the Third Circuit's] prior decision" in *Booth*, in which the court *sua sponte* dismissed a prisoner's complaint for failure to exhaust administrative remedies. (Pet. at 8); *see Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000). Like *Massey v. Wheeler*, however, *Booth* involved a prisoner who *conceded* in his complaint that he had not exhausted his administrative remedies. *Id.* at 292 n.3. The court in *Ray* explicitly made this very point in refuting an argument similar to the one Petitioners assert here. *Ray*, 285 F.3d at 293 n.5 (distinguishing *Booth* on the grounds that the prisoner had conceded his failure to exhaust administrative remedies).

Petitioners take the position that the Fifth Circuit follows an approach similar to that of the anomalous Sixth Circuit. (Pet. at 8.) This is simply not the case. The lone Fifth Circuit case cited by Petitioners – *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998) – does not adopt a heightened pleading standard or otherwise follow the Sixth Circuit. Rather, in *Underwood*, the court merely concluded that a prisoner could avoid dismissal, despite the lack of evidence of exhaustion in the record, by alleging exhaustion "with sufficient specificity." *Id.* at 296.

Furthermore, subsequent Fifth Circuit cases – none of which are cited in Petitioners' brief – clarify that the Fifth Circuit's view of exhaustion under the PLRA is consistent with the majority rule. Indeed, in *Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998), the court explained that exhaustion under the PLRA "imposes a requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling." *Id.* at 890; *see also Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003) (citing *Wendell* and reciting the above quote).

Petitioners also argue that the D.C. Circuit in *Jackson* "did not decide this issue." (Pet. at 7 n.3.) It is clear, however, that the D.C. Circuit at least *implicitly understood* exhaustion under the PLRA to be an affirmative defense. In *Jackson*, the prisoners argued that the defendants had "waived the [exhaustion] *defense*" by failing to assert it in their original answers. 254 F.3d at 267 (emphasis added). The court considered, but ultimately denied, the argument. *Id.* Clearly, if the court did not view exhaustion as an affirmative defense, it would have had no reason to even consider the waiver argument.[11]

Petitioners further assert that *Wyatt III* is inconsistent with a prior Ninth Circuit opinion, *Bennett v. King*, 293 F.3d 1096 (9th Cir. 2002).[12] (Pet. at 8.) In *Bennett*, the district court dismissed a prisoner's complaint for failure to exhaust administrative remedies but gave him 30 days leave to amend to cure the defect. Because the prisoner failed to amend within 30 days, the district court dismissed the action. *Id.* The prisoner appealed, and the Ninth Circuit, after considering the evidence of exhaustion, concluded that the prisoner "did not exhaust his administrative remedies." *Id.* Nothing in *Bennett*

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11. Thus, in *Abdus-Shahid M.S. Ali v. District of Columbia*, 278 F.3d 1, 5-6 (D.C. Cir. 2002), the court, in holding that the PLRA's exhaustion mandate is not jurisdictional, observed, "Although we have never directly ruled that the requirement is not jurisdictional, in *Jackson* we rejected inmates' argument that the defendants had waived their exhaustion defense, 254 F.3d at 267 (D.C. Cir. 2001), *an issue we never would have considered if exhaustion were jurisdictional*." (Emphasis added).

12. Petitioners improperly cite to an earlier, withdrawn opinion from *Bennett*. (Pet. at 8); *see Bennett v. King*, 205 F.3d 1188 (9th Cir. 2000), *withdrawn by Bennett v. King*, 293 F.3d 1096 (9th Cir. 2002). We assume for the sake of this Opposition that Petitioners intended to cite to the more recent opinion.

suggests that the court either explicitly or implicitly endorsed a heightened pleading standard like the one in the Sixth Circuit.[13]

Finally, and tellingly, Petitioners fail to acknowledge the First Circuit's recent adoption of the majority rule, in *Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002). In reaching its decision in that case, the court observed that "the vast majority of courts have characterized PLRA exhaustion as an affirmative defense." *Id.* That apt observation continues to be true today, regardless of the State's wishes otherwise.

C. Federal Rule of Civil Procedure 9(c) Does Not Impose a Heightened Pleading Standard for the Performance of a Condition Precedent

Petitioners mistakenly assume that if exhaustion is a condition precedent, it necessarily must be plead with some heightened level of specificity. This assumption, however, directly conflicts with Federal Rule of Civil Procedure 9(c), which eliminates heightened pleading standards for conditions precedent.

Federal Rule of Civil Procedure Rule 9(c) provides,

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Fed. R. Civ. P. 9(c). The purpose of Rule 9(c) was "to eliminate the detailed and largely unnecessary averments that resulted under

13. The Eighth Circuit is the only circuit that has changed its position on this issue, initially adopting a heightened pleading standard based on the Sixth Circuit rule, *see McAlphin v. Morgan*, 216 F.3d 680, 682 (8th Cir. 2000), and subsequently adopting the majority rule that exhaustion is an affirmative defense, *see Foulk*, 262 F.3d at 697.

common law procedure, and to prevent nonmeritorious dismissals for failure to plead fulfillment of conditions precedent that are not at issue in the suit." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1302 (2d ed. 1990). Rule 9(c) does not expressly require that performance of conditions be pled; it merely sets forth the *manner in which such allegations should be made. See Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (9th Cir. 1998) (holding that the allegation that an accident occurred while an insurance policy was in full force and effect is considered an "averment" that all conditions precedent have been satisfied). Accordingly, even assuming, *arguendo*, that the Court were to conclude that exhaustion under the PLRA *is* a condition precedent to suit under the PLRA, it does not follow that this would impose a heightened pleading standard similar to the one adopted by the Sixth Circuit. In fact, Rule 9(c) explicitly forecloses such a result.[14]

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14. It is worth noting that in *Wyatt I*, the Ninth Circuit determined that Respondent's allegations of exhaustion were sufficient to survive a Rule 12(b)(6) motion. *See Wyatt I*, 280 F.3d at 1246. Accordingly, even if the Court were to adopt the Sixth Circuit's heightened pleading standard, it would likely not alter the outcome of the Ninth Circuit's ruling on the State's motion to dismiss.

II.

THE PETITION SHOULD BE DENIED BECAUSE *WYATT III* DOES NOTHING MORE THAN WHAT NUMEROUS CIRCUITS, INCLUDING THE NINTH, HAVE CONSISTENTLY AND JUSTLY DONE: REQUIRE THAT *PRO SE* PRISONER LITIGANTS RECEIVE "FAIR NOTICE" OF FED. R. CIV. P. 56'S SUMMARY JUDGMENT PROCEDURES BEFORE SUMMARY JUDGMENT MAY BE ENTERED AGAINST THEM

A. The Courts Of Appeals Uniformly Agree That *Pro Se* Prisoner Litigants Are Entitled To "Fair Notice" Of Summary Judgment Procedures

In its zeal to portray the Ninth Circuit as a renegade, the State attempts to characterize *Wyatt III* as establishing new frontiers regarding the provision of summary judgment notice to *pro se* prisoner litigants. (*See* Pet. at 10, 13.) In fact, however, numerous circuits, including the Ninth, have long held that courts should ensure *pro se* prisoner litigants receive "fair notice" of Fed. R. Civ. P. 56 procedures before entering summary judgment against them.[15] *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d

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15. "Fair notice" consists of "ordinary, understandable language calculated to apprise an unsophisticated prisoner of his or her rights and obligations under Rule 56" and should include –

> 1) notice of the right to file counter-affidavits or other responsive evidentiary materials;
>
> 2) notice that the failure to do so may result in the moving party's evidence being taken as the truth and in the entry of judgment against the *pro se* prisoner; and

(Cont'd)

639, 642 (2d Cir. 1988) ("If the district court does not so inform the *pro se* party" of the "nature, procedures and consequences of a motion for summary judgment . . . the court may not grant judgment for the moving party"); *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988) ("[d]istrict courts are obligated to advise prisoner pro per litigants of Rule 56 requirements"); *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) ("our jurisprudence requires at least" that a *pro se* prisoner "be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default"); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982) ("we think it appropriate to lay down a general rule that a prisoner who is a plaintiff in a civil case and is not represented by counsel

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(Cont'd)

> 3) notice that if summary judgment is granted, the "prisoner's case will be over" and there will be no trial.

Rand v. Rowland, 154 F.3d 952, 960-961 (9th Cir. 1998) (*en banc*) (setting forth a "model" notice at Appendix A); *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (timely notice of the summary judgment rules should include notice of the "right to file affidavits or other material in opposition to the motion, and of the consequences of default"). Such notice is provided to *pro se* prisoner litigants because of the "complexity of the summary judgment rule," the finality of an order entering summary judgment, the "lack of legal sophistication of the *pro se* prisoner," and the prisoner's limited access to counsel and legal materials. *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982); *Rand*, 154 F.3d at 957-958. Such notice is also consistent with the judicial policy of "liberal construction in favor of *pro se* litigants" generally as well as the "Supreme Court's teaching that affirmative measures are sometimes required to ensure that a prisoner's access to the courts is 'adequate, effective, and meaningful.'" *Rand*, 154 F.3d at 957-958 (quoting *Bounds v. Smith*, 430 U.S. 817, 822-823 (1977)).

is entitled to receive notice of the consequences of failing to respond with affidavits to a motion for summary judgment"); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (state inmate must be "advised of his right to file counter-affidavits or other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him"); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968) (district courts should provide *pro se* prisoners with "fair notice of the requirements of the summary judgment rule").

Not surprisingly, these courts have also consistently held that such notice should be provided when summary judgment is implicated, regardless of how the movant chooses to style its motion. Therefore, the same summary judgment notice procedures are followed whether the dispositive motion originates as a Rule 56 summary judgment motion, or as a Rule 12 motion to dismiss that is converted to a summary judgment motion because of a court's consideration of evidence extrinsic to the pleadings. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992); *Lewis*, 689 F.2d at 101; *Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978).[16]

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16. The State's attempt to generate controversy where none exists is exemplified by its incorrect assertion that *Wyatt III* attempts to expand the Ninth Circuit's fair notice practice to "Rule 12 motions to dismiss." (Pet. at 10, 13.) *Wyatt III* does nothing of the sort. Instead, *Wyatt III* states that where a "district court *looks beyond the pleadings* to a factual record in deciding the motion to dismiss for failure to exhaust – *a procedure closely analogous to summary judgment* – then the court must assure that Wyatt has fair notice of his opportunity to develop a record." (App. 20 at n.14) (emphasis added). This is neither novel nor controversial. *See Lewis*, 689 F.2d at 102 ("It goes without saying that the [fair notice] rule applies with equal force when affidavits are submitted in support of a motion to dismiss" – *i.e.* where the court *looks beyond the pleadings*); (Cont'd)

Indeed, with respect to such notice, the Ninth Circuit has been more conservative than others, which require "fair notice" to all *pro se* litigants – not merely those who are incarcerated. *See, e.g., Ruotolo v. Internal Revenue Service*, 28 F.3d 6 (2d Cir. 1994); *Timms v. Frank*, 953 F.2d 281 (7th Cir. 1992); *United States v. One Colt Python .357 Cal. Revolver*, 845 F.2d 287 (11th Cir. 1988).

The State attempts to manufacture a circuit "conflict" – in the otherwise consistent application of summary judgment notice to *pro se* litigants – by pointing to the Sixth Circuit's decision in *Williams v. Browman*, 981 F.2d 901 (6th Cir. 1992), and the Fifth Circuit's decision in *Martin v. Harrison County Jail*, 975 F.2d 192 (5th Cir. 1992). (Pet. at 10-11). Such conflict simply does not exist.

On May 27, 2003, the Sixth Circuit issued *United States v. Ninety-Three (93) Firearms*, __ F.3d __, 2003 WL 21210444 (6th Cir. May 27, 2003). There, referring to *Williams* and *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988) – a case ignored by the State – the Sixth Circuit correctly described the state of intra-circuit law at that time:

> While the *Williams* court stated that this circuit has 'no authority . . . for the proposition that a district court must advise a *pro se* prisoner of his right to file counter-affidavits or other responsive material or that he must be alerted to the fact that

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(Cont'd)

Fed. R. Civ. P. 12(b) ("if . . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material").

> his failure to so respond with such material might result in entry of summary judgment against him,' it failed to cite *Brock*, which appears to reach the opposite conclusion.

Ninety-Three Firearms, 2003 WL 21210444 at *12. The Court continued by applying the *Brock*, not the *Williams*, summary judgment notice rule to the *pro se* prisoner litigant involved there. *Id.* at *13. Accordingly, the weight of Sixth Circuit authority is consistent, not in conflict, with *Wyatt III*.

A similar result occurs when reviewing the Fifth Circuit's *Martin* decision. *Martin* clearly states: "We adopt the rule of the Sixth and Ninth Circuits" in *Brock* and *Jacobsen v. Filler*, 790 F.2d 1362, 1364-67 (9th Cir. 1986), respectively. *Martin*, 975 F.2d at 193. As described by the Sixth Circuit itself in *Ninety-Three Firearms, supra*, *Brock* holds that *pro se* prisoners should be afforded fair notice of Rule 56 summary judgment procedures. *Jacobsen* does the same, with both concluding that such notice need not be afforded to *pro se* non-prisoner litigants. *See Brock*, 840 F.2d at 343; *Jacobsen*, 790 F.2d at 1364-65 n.4. Therefore, again contrary to the State's representations, the law in the Fifth Circuit is consistent, not in conflict, with *Wyatt III*.

Interestingly, the State notes that the "First, Third, Eighth and Tenth Circuits have filed no opinions" concerning fair notice, apparently contending that this further supports their notion of a circuit conflict. (Pet. at 10.) The State's view is inaccurate. In *Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978), the Eighth Circuit held, albeit without expressly referring to "fair notice," that summary judgment could not be entered where the court did not first notify plaintiffs that

it was converting a Rule 12 motion into a Rule 56 motion and did not afford plaintiffs the opportunity to submit responsive evidence. The court was "particularly concerned" about the requisite notice because plaintiffs were *pro se* prisoners. In *Jaxon v. Circle K Corporation*, 773 F.2d 1138, 1140 (10th Cir. 1985), the Tenth Circuit reversed in part summary judgment because of insufficient notice of summary judgment procedures to plaintiff: "District courts must take care to insure that *pro se* litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings." *Id.* (quoting *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984)). Accordingly, the State incorrectly identifies those circuits which have remained silent regarding summary judgment notice, fails to mention that some of the allegedly silent circuits have, in fact, vocalized *consistency* with the *Wyatt III* approach, and illogically infers conflict from silence – all in an effort to persuade this Court of that which does not exist.

Contriving a purported circuit conflict is not Petitioners only error. The State suggests that the summary judgment notice procedures adopted by the Ninth Circuit – and presumably by each of the other nine Courts of Appeals identified above that have ruled consistently – amount to an improper, judicial amendment of the Federal Rules of Civil Procedure. (Pet. at 9-10.[17]) The Courts of Appeals have done nothing of the sort. These courts have simply sought to ensure that those with the most limited access to information and the law be informed of relevant portions of the Federal Rules before their cases may be disposed of on summary judgment. None of the information to be provided is anything other than what Fed. R. Civ. P. 56 already

17. The Rules Enabling Act and Federal Courts Study Act cited by the State were enacted in 1948 and 1988, respectively, not in 1998, rendering the State's "lack [of] rules promulgating-guidance" argument inapplicable. (*See* Pet. at 11 n.4.)

contains. As such, "[a]doption of the fair notice requirement is . . . a proper exercise of [] supervisory power" of the Courts of Appeals over the district courts within their respective circuits. *Rand*, 154 F.3d at 958-959.

B. The Summary Judgment Sought By The State Was And Would Be Denied, Regardless Of Whether Wyatt Received "Fair Notice"

Even if "fair notice" was withheld from Wyatt, as the State apparently argues should have occurred, the Ninth Circuit made clear that the result would be no different – the State's motion for summary judgment on Wyatt's First Amendment free exercise claim would still have been denied. *Wyatt III*, 315 F.3d at 1113-1114. Accordingly, reversal of the appellate court's notice requirements would leave the parties in the same place, rendering reversal futile. *Timms*, 953 F.2d at 286.

As set forth in *Wyatt III*, the State's summary judgment on Wyatt's free exercise claim depends on extensive facts taken from *Toyebo v. Terhune*, No. S-98-0292 (E.D.Cal. Aug. 28, 1990). *Wyatt III*, 315 F.3d at 1113; *see* App. 31-53. The State, however, did not offer any authority for admitting these facts into evidence, and the district court's attempt to utilize judicial notice "exceed[ed] the limits of Rule 201" of the Federal Rules of Evidence. *Id.* at 1113-1114 (citing *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983)). Judicial notice was particularly inappropriate where, as here, the litigants in both proceedings were not the same, such that Wyatt did not have the opportunity to challenge the "facts" from *Toyebo*.

Because the State's summary judgment motion would be denied on the facts, whether or not Wyatt received fair notice of the procedures set forth in Fed. R. Civ. P. 56, consideration of the fair notice issue presented by the State's petition would at best result in harmless error. 28 U.S.C. § 2111; Fed. R. Civ. P. 61; *United States v. Lane*, 474 U.S. 438, 454-455 (1986) (Brennan and Blackmun, JJ., concurring in part and dissenting in part) (lower court error "affects substantial rights" under Section 2111 and is reversible "only if it casts doubt on the outcome of the proceeding").

CONCLUSION

For these reasons, the State's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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